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In the Supreme Court of the United States

OCTOBER TERM 1946

No. .....

SOUTHERN PACIFIC COMPANY, a railroad corporation, Intervener,

Petitioner,

vs.

BERRYMAN HENWOOD, as Trustee of ST. LOUIS SOUTHWESTERN RAILWAY COMPANY LINES, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

To the Honorable the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Southern Pacific Company, appellant in the above-entitled case in the United States Circuit Court of Appeals for the Eighth Circuit, numbered 12883, therein, prays that a writ of certiorari issue to review the judg-

ment (R. 5559-5683) of that court in this case.[1] This judgment affirmed, with amendments not now material, an order (R. 5183-5213) of the United States District Court for the Eastern District of Missouri, which approved a plan of reorganization for St. Louis Southwestern Railway Company (hereinafter referred to as Debtor), certified by the Interstate Commerce Commission under Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205).

SUMMARY STATEMENT OF THE MATTER INVOLVED

The questions presented are:

1. Can application of an Interstate Commerce Commission reorganization plan, under which a carrier's stock is found to be without value and excluded from participation, be sustained as equitable, when, in the interim between the adoption and the time of application of the plan, the carrier, through payments of indebtedness and accumulation of net current asset balances, has ceased to be insolvent and has achieved solvency, in the bankruptcy sense, by a wide margin?

2. Can application of such a plan and valuation be sustained as equitable when, in the interim between its adop-

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(1) This case was decided by the Circuit Court together with companion cases No. 12882, *St. Louis Southwestern Railway Company v. Berryman Henwood;* No. 12884, *Horace A. Davis, Benjamin S. Lichtenstein and Sylvan Gotshal, as a Protective Committee for Holders of Central Arkansas & Eastern Railroad Company Bonds, vs. Berryman Henwood;* No. 12885, *Horace A. Davis, Benjamin Lichtenstein & Sylvan Gotshal, as a Protective Committee for Holders of Stephenville North & South Texas Railway Company Bonds vs. Berryman Henwood*; and No. 12886, *Walter E. Meyer v. Berryman Henwood.* All these cases were submitted to the Circuit Court on a consolidated record.

tion and application, the carrier's post-war peacetime net income has soared to a much higher plane than the earlier pre-war peacetime level considered by the Commission as the basis for its valuation?

3. Can a claim be completely excluded from participation in a railroad reorganization plan when, at the time the plan is to be applied, the carrier's assets are in excess of its other obligations, and at the same time its earnings are sufficient to justify a valuation recognizing the claim?

The questions are presented upon the following facts:

In its original plan of reorganization for the Debtor, set forth in its report of June 30, 1941 (R. 3495-3735), the Commission found the Debtor's value for new capitalization should not exceed approximately $75,000,000. Such capitalization was to be made up of certain existing first mortgage bonds left undisturbed and of new securities including 10 year four percent serial notes, consolidated mortgage 50 year four percent bonds, five percent preferred stock, and common stock to be distributed to creditors (R. 3733). Debt claims totaling $8,304,118 received no recognition within the limits of capitalization approved, and the existing preferred and common stock of the Debtor, of which petitioner holds a majority interest, was found to have no value and accordingly excluded from participation in the plan (R. 3700). The valuation in the original decision was challenged by several parties, including petitioner, but on March 9, 1942, the Commission, upon a submission to it of October 8, 1941, issued a supplemental report refusing to modify materially its previous valuation (R. 3736-3820, 5575).

In attacking this plan before the District Court and on appeal in the Circuit Court it has consistently been petitioner's position that Debtor's financial position and its earnings have undergone such an extreme improvement subsequent to the time when the Commission made its valuation as to render utterly inequitable the present application of the Commission's valuation and of its determination that the Debtor's stock was valueless. Particularly, before the Circuit Court, petitioner contended in its principal argument and in its petition for rehearing that the present application of the Commission's valuation was inequitable because of the following changed conditions developing subsequent to the Commission's supplemental decision: (1) the fact that there has been a very substantial reduction of long term indebtedness and a tremendous improvement in the balance of current assets over current liabilities with the result that the Debtor, which, at the time of the Commission's decision, was insolvent, in the bankruptcy sense of excess of liabilities over assets, by about $8,000,000, had now actually achieved a position of solvency in that sense by a wide margin; and (2) the fact that Debtor's post-war net railway operating income and income available for fixed charges, which are indicative of the long term future situation, are much higher than the comparable figures for pre-war years used by the Commission as the basis for its valuation (R. 5658, 5659, 5716-5727). This change of conditions, petitioner has insisted, required the plan to be remanded to the Commission for reconsideration in the light of the present picture.

The latest earning figure referred to in the Commission's supplemental report was of earnings to June 30,

1941 (R. 3739). There is in the record a copy of Debtor's balance sheet for August 31, 1941, (R. 4077, 4079) which we may assume shows approximately the assets being valued by the Commission in its supplemental report decided on a record submitted October 8, 1941. The latest statement made by the Commission as to Debtor's debt position was that in its supplemental report, setting forth the principal amount of such indebtedness with interest to January 1, 1942 (R. 3785).

In support of petitioner's contention that this record is now stale, it and the Debtor have sought to supplement the record by providing the District Court and the Circuit Court with the latest available balance sheets and income accounts for the Debtor subsequent to those considered by the Commission, a procedure accepted by this Court in *Ecker v. Western Pacific R. Corp.* 318 U.S. 448, 507. It appears that the District Court considered the revenues and financial condition of Debtor for 1941 and 1942, and, so far as then available, those for 1943 (R. 5654). In the Circuit Court a motion of the Debtor was granted to supplement the record with Debtor's income accounts for the years 1941 through 1944 and with its balance sheets for December 31 of each of those years (R. 5654). These matters were filed by the Debtor's trustee in the District Court in the regular routine procedure, and were considered by the Circuit Court (R. 5654). Petitioner attached as exhibits to its petition for rehearing, and submitted in evidence, copies of the Debtor's income accounts for 1945, and the first seven months of 1946, and of Debtor's balance sheets for December 31, 1945 and July 31, 1946 (R. 5719). In keeping,

with this practice petitioner has attached as Appendices A and B hereto, copies of the Debtor's income accounts for the first ten months of 1946, and its balance sheet for October 31, 1946, the latest such figures now available.

Comparison of these subsequent figures with those before the Commission reveals what an extraordinary improvement there has been in Debtor's asset and liability position since the Commission's decision. Debtor's balance of current assets over current liabilities as of August 31, 1941, and the total of its long term debt, including interest to January 1, 1942, which figures may be regarded, as indicated above, as those forming the basis for the Commission's valuation in its supplemental report, were as follows:

Net Current Asset Balance	$ 6,270,221.42[2]
Long Term Debt and Accrued Interest	83,243,764.00[3]

As of the time of the Commission's supplemental decision Debtor was found by the Commission to be insolvent in the bankruptcy sense by the amount of $8,304,118, the portion of its indebtedness receiving no recognition in the Commission's plan (R. 3700).

Considering the same items as shown by Debtor's balance sheet for December 31, 1944, the latest figures before

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(2) (R. 4077, 4079), Current assets were $9,199,570.33 and current liabilities were $2,929,348.91). There is excluded in this computation of total current liabilities the amount of $5,797,-558.36 "Loans and Bills Payable (In Default)" (R. 4079), which item is made up of notes to the Chase National Bank, the Mississippi Valley Trust Company and the Railroad Credit Corporation These items are excluded for the reason that they are included in the long term debt figures in the next line, to be refunded under the plan of reorganization (R. 3785).

(3) (R. 3785).

the Circuit Court at the time of the argument before it, the totals were as follows (R. 5738, 5739):

Net Current Asset Balance	$14,860,520.02
Long Term Debt and Accrued Interest in Default	77,861,776.47[4]

The total improvement in these figures over the comparable ones considered by the Commission is $13,972,286.13. Consequently, as of that date, the condition of insolvency by approximately $8,300,000 which had existed when the Commission made its decision had been completely changed, and Debtor was then solvent by approximately $5,600,000. Continued excellent earnings by the Debtor during the remainder of the war period and during the peacetime era since have enabled it to improve its financial position even more through reduction of its indebtedness and increase of its net current assets. Thus, as of October 31, 1946, the comparable net current asset balance and debt figures were as follows (Appendix B):

Net Current Asset Balance	$22,090,504.54
Long Term Debt and Accrued Interest in Default	71,944,971.96

(4) This figure represents the total of long term debt and interest in default reduced by $7,859,305.73, which is the total of $6,957,500, the portion of Debtor's $10,000,000 issue of second mortgage income bonds held in its treasury and of two open accounts with the Debtor's subsidiaries, Southwestern Transportation Co. in the amount of $890,289.51 and the S. W. Town Lot Corp. in the amount of $11,516.22. These items are properly excluded for comparative purposes, because the Commission excluded them in making its total debt determination as of January 1, 1942 (R. 3785), and because they are intra-system obligations. In additions made to footnote 20 of its opinion at the time the petitions for rehearing were denied, the Circuit Court recognized that the $6,957,500 amount of second mortgage bonds held in the treasury was not an outstanding indebtedness and should properly be eliminated (R. 5664-5665). The court overlooked eliminating the smaller amounts covering the open accounts, but for the same reasons they should also be eliminated.

The total improvement over those considered by the Commission as of the above date was thus $27,119,075.16. Debtor was then solvent by a margin of approximately $18,800,000.[5]

The case for the present solvency of the Debtor is presented upon the basis of reduction in debt and improvement in current liquid assets. It is not necessary to place reliance upon improvement in property account resulting during the trusteeship from the plowing of funds back into the property. However, by reason of investment of earnings in this property the road and equipment account increased from August 31, 1941 to October 31, 1946, by $12,727,394.21, from $123,849,919.48 to $136,577,-313.69 (R. 4077, Appendix B). This despite large write-offs because of abandoned lines and for amortization of war facilities. A substantial amount of this investment has been in rolling stock. Such investment, in diesel locomotives, new freight cars, etc. cannot be discounted. Ordinarily such purchases are financed to the extent of 80% of cost through equipment trust certificates or conditional sales but here the full purchase price was paid in cash.

Since October 31, 1946, the Debtor has further continued to retire its indebtedness. With the approval of the bankruptcy court, evidenced by order of September 3, 1946 (attached hereto as Appendix C), it retired on December 1, 1946, its Texarkana Union Station five percent certificates in the principal amount of $315,000.

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(5) Financial periodicals have clearly recognized Debtor's present solvency. Thus, in an article entitled "Cotton Belt Is Solvent Today," Standard & Poors Railroad Securities Weekly Outlook Section, December 27, 1945, pgs. B-87-88, it was said: "Whatever the decision, the reduction in claims and the vast improvement in the company's finances have made the I.C.C. plan obsolete . . . In other words, the company is solvent."

Considering in detail the whole debt picture, it is to be noted that Debtor has now paid off $15,105,483 of the principal and interest in default on its obligations funded under the Commission's plan (to January 1, 1942) as follows:

Equipment Obligations (R. 3785, 5739) Principal	$ 216,000
Texarkana Union Station 5's (R. 3785, Appendix C hereto) Principal	315,000
Railroad Credit Corporation (R. 3785, Appendix D hereto) Principal and interest to January 1, 1942	1,331,300
First Terminal and Unifying 5's (R. 3785, 5267, 5273-5274) Interest to January 1, 1942	2,620,475
General and Refunding 5's (R. 3785, 5268, 5274-5275, 5704, 5709) Interest to January 1, 1942	3,031,437
Second Mortgage 4's (R. 3785, 5265) Interest to January 1, 1942	791,050
Reconstruction Finance Corporation (Southern Pacific Co.)[6]	5,468,363
Chase National Bank[6]	1,035,887
Mississippi Valley Trust Co.[6]	295,971
Total	$15,105,483[7]

(6) The amount of interest on these obligations funded in the plan was as follows:

	Principal and Interest	Principal	Interest
Southern Pacific	$23,350,613 (R. 3781)	$17,882,250 (R. 3785)	$5,468,363
Chase National Bank	4,535,887 (R. 3781)	3,500,000 (R. 3785)	1,035,887
Mississippi Valley Trust Co.	1,295,971 (R. 3781)	1,000,000 (R. 3785)	295,971

Since these notes were secured by pledge of $30,230,000 of the Debtor's General and Refunding 5's (R. 3514), the interest payments made on the latter bonds to the pledgees subsequent to the submission of the case to the Commission have served to reduce the above notes. Inasmuch as interest has been paid on these bonds between January 1, 1936, and July 1, 1942 (R. 5268, 5274-5275, 5704, 5709), the total amount received by the

In addition, it has paid interest currently, accruing since January 1, 1942, on its First Mortgage bonds (never defaulted), its Second Mortgage bonds, and its Terminal and Unifying bonds, and has also paid interest on its Generals through July 1, 1942 (R. 5701, 5706).

When consideration is given to the Debtor's earnings, a factor which this Court has recognized as extremely important in making an evaluation for new capitalization purposes, the improvement between those of the pre-war era considered by the Commission and those of the war-time period, and particularly the post-war period, is equally impressive. Debtor's income available for fixed charges, as tabulized for the years from 1923 through 1944, is as follows (R. 5657):

1923	$5,929,628	1934	$ 2,024,891
1924	5,028,749	1935	2,695,111
1925	5,057,460	1936	3,333,243
1926	5,072,628	1937	2,304,505
1927	4,692,923	1938	2,088,299
1928	4,382,449	1939	1,199,158
1929	3,714,052	1940	2,860,221
1930	2,380,379	1941	7,495,940
1931	2,710,861	1942	8,692,636
1932	125,857(deficit)	1943	10,562,547
1933	1,840,184	1944	11,133,608

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above pledges has been $10,580,500, or well in excess of the funded interest to January 1, 1942 on their notes. This reduction in principal and interest has occurred, irrespective of whether the payments are applied to the principal of the notes, interest thereon, or to principal and interest pro rata.

(7) This figure does not take into account the situation with respect to interest accruals and payments made for the period subsequent to January 1, 1942. But the actual reduction, as of October 31, 1946, in the amount of Debtor's long term debt and interest, as it existed on January 1, 1942, is not less impressive, being $11,298,792.04 (pgs. 6, 7, *supra*.)

As pointed out in petitioner's petition for rehearing, the comparable figure for 1945 was $7,001,641.15 (R. 5727). In Appendix A hereto, the comparable figure for the first 10 months of the first full post-war year, 1946, is set forth, showing income available for fixed charges of $5,949,631.47. If the same rate of income is continued for the remainder of the year, the figure will again be approximately $7,000,000, as it was in 1945.

It is plain from the above that Debtor's post-war income available for fixed charges for the year 1946 will be far in excess of the same for any pre-war year considered by the Commission. It is anywhere from two to six times the comparable figures for the pre-war period from 1930 through 1940, upon which the Commission primarily relied (R. 3690). It is nearly three times the annual charges ahead of common stock of $2,451,228 (consisting of $1,513,723 interest and $937,505 preferred stock dividends) for which provision is made in the Commission's plan (R. 3785). It will be over two times the approximately $3,000,000 of interest charges upon existing debt (R. 5257).

Class I Railroads in the aggregate reported a *net loss* for the first six months of 1946 of $28,022,428, but the Debtor for this period had a net income of $1,433,669 after fixed charges (R. 5756,[8] I.C.C. Statement M-125, Selected Income and Balance Sheet Items for Class I Steam Railroads in the United States). Its existing fixed charges for this period were earned nearly two times over (R.

(8) These figures for the Debtor during the first six months of 1946 may be derived by subtracting the figures for July 1946, shown at R. 5756, from those shown at the same page for the period from January 1, to July 31, 1946.

5756). Thus the Debtor in 1946 has done much better than the average of this industry.

Debtor's tremendously increased income for the post-war period, as represented by 1946, cannot, like the "unreliable norm" of war earnings, be considered something merely temporary, or as a carry-over from the unprecedented earnings of the preceding war years. Instead it is explained by an extreme shift of population and business to the centers of California and Texas, notably Los Angeles, Houston, Dallas and Fort Worth, which Debtor serves either as a "bridge carrier" or directly from St. Louis. Judicial notice must be taken of the amazing population increase and industrial development[9] in these cen-

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(9) The United States Census Bureau reports that the population of Los Angeles as of January 28, 1946, was 1,805,687, an increase of 20 percent since April 1, 1940 (Census Bureau Report, Series P-SC, No. 119, April 10, 1946). The 1940 census shows the populations of Houston, Dallas and Fort Worth respectively, as 384,514, 294,734 and 177,662. According to estimates made, in the case of Houston, by utility companies, and, in the case of Dallas and Fort Worth, by their Chambers of Commerce, the 1946 populations of these same cities were respectively: 478,000, 425,000 and 235,117. This represents respective percentage growths of 16 percent, 44 percent and 25 percent. Total California and Texas population increases between April 1, 1940 and July 1, 1945, were respectively 27.7 percent and 5.8 percent, California showing the largest numerical gain of any state during that period, a gain of 1,600,000 (Census Bureau Report, Series P-46, No. 3). The same publication shows that the total population of the United States as a whole during the same period increased by only .2 percent.

The business growth of these cities has been equally impressive. For the first 10 months of 1946 the retail sales in Los Angeles, Houston, Dallas and Fort Worth were respectively: 27, 33, 34 and 24 percent higher than the comparable sales in those cities for the first ten months of 1945 (Census Bureau Monthly Retail Trade Reports, California and Texas, October, 1946.)

The *Monthly Business Review of the Federal Reserve Bank of Dallas*, Jan. 1, 1946, Vol. 31, Number 1, pgs. 3-4, makes the

ters in relation to the rest of the country, which, while undoubtedly war induced, is likely to continue for the long term peacetime future. Account must also be taken of the action of the Interstate Commerce Commission in

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following observation in an article entitled "Post-war Prosperity in the Southwest":

> "This regional area experienced a greatly accelerated industrial expansion and development during the war years, the rate of growth having been above the average rate of expansion for the country as a whole.
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> Several developments of the war period seem to indicate favorable prospects for industrial expansion in the Eleventh District. Certainly among the most significant results of the wartime industrial growth in this District is that a skilled industrial labor force has been developed. Equally important is the fact that the war production experience taught a great many small producers the productive and managerial skills which are essential in an industrial area and which may serve as a foundation upon which a healthy, lasting postwar industrial growth may be developed. The rubber industry has been brought to this district, while the chemical industry has been greatly expanded. This district supplied a large part of the nation's petroleum requirements during the war, and the refining facilities of the area have been substantially increased. It is quite probable, therefore, that in the future a larger proportion of our petroleum may go out of this area in the form of refined products, thus giving to the area the gain of value added by processing. It is also likely that some part of the wartime gain in aircraft construction and shipbuilding may be retained. Certain of the smaller aircraft plants in the area, either already have converted to civilian production or are in the process of doing so.
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> Despite the very liquid current financial condition of business and industry in the area, the probability of a higher level of postwar economic activity in this district as compared with prewar levels indicates a favorable loan outlook for the banks of the area. Attraction of new industries to the Southwest and a possible increase in the number of small businesses further support this view."

Senator Wheeler has clearly recognized that the improvement in the financial picture of the carriers in the Southwest is due to fundamental changes in economic conditions in that area. Thus

its decision of December 5, 1946, in *Ex Parte No. 162, Increased Railway Rates, Fares and Charges, 1946,* and *Ex Parte No. 148, Increased Railway Rates, Fares and Charges, 1942,* which permits increases of basic freight rates by 20 percent for the future and permits continuation of previously granted passenger fare increases. These factors all lead to the inescapable conclusion that Debtor's permanent post-war earning power is now and will be at a much higher level than that envisaged by the Commission when it formulated the reorganization plan.

Despite this unprecedented showing which was made in support of petitioner's two principal contentions mentioned above, the Circuit Court rejected them, as indicated by the following language from its opinion:

(R. 5662-5663)

> "First, accent is placed upon the solvency of Debtor, as claimed to be shown by the above and related statistics from balance sheets of Debtor and elsewhere. By solvency they mean balance of assets over debts. Solvency in that sense is far from con-

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he declared at the hearings before the Senate Committee on Interstate Commerce on S. 1253, the so-called Wheeler-Reed bill, considered *infra* pgs. 18, 37-41 (79th Cong. 2nd Session, March 7, 1946), pg. 515:

> "The vastly improved situation comes not only from increased earnings but takes into account economic conditions which have changed in certain parts of the country. Here we have Texas, which had Jesse Jones up in the RFC; a tremendous number of factories have been built in that State.
>
> You have had this changed economic situation. You have had it in Colorado, in Texas, Missouri, and all through that section, so that even though in peacetime some of those roads in the Southwest are going to enjoy more traffic. And then I think you are bound to get a decentralization of some of the industries in the East; they are bound to move to the West, not only for the welfare of the particular industry but for the welfare of the Country."

trolling in railway reorganization proceedings. The lack of solvency which justifies initiation of reorganization of railroads is inability to meet debts as they become due. The purpose of such proceedings is to produce a capital structure—as to amount and character—which will warrant continued ability, for a long period, to serve the public properly and to pay debts as they may mature and probably leave something for the new stock (*Reconstruction Finance Corporation, et al., v. Denver & R.G.W. R.R. Co., et al.,* ..... U.S. ..... June 10, 1946, "In conclusion" paragraph; *Consolidated Rock Co. v. Du Bois,* 312 U.S. 510, 525). The fact that the physical properties, including cash and liquid securities, may have a value beyond the total indebtedness is not controlling either at the beginning or during such reorganization proceedings. The only place for bettered conditions after formation of a Plan by the Commission, is where such conditions have so altered the situation as to make the Plan inequitable to existing creditors or stockholders (*Reconstruction Finance Corporation, et al., v. Denver & R.G.W. R.R. Co., et al.,* ..... U.S. ..... June 10, 1946). Solvency in the sense of balance of assets over liabilities has small bearing on such equity.

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(R. 5669)

Also, our problem is not whether these actual and potential funds *might* make an increased valuation and capitalization better than those of the Plan. It is whether, if the Commission had before it all that has come in to the record before the District Court and before us, it would be arbitrary for it to adhere to its present Plan. That these much improved conditions as to cash, liquid assets and potential tax refunds *might* alter the picture as seen by the Commis-

sion at the time of its reports seems true. However, that they *must* do so because otherwise the sight of the Commission would have to be declared arbitrary, we think is not true.

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(R. 5658)

It is urged that though there will be a falling off in revenue at the end of the war, yet there will be an increase of business for Debtor over that before war. The argument is that the increase in population into this territory during the war will result in many of these newcomers remaining; and that many of the numerous war industries established there will be converted into peacetime uses. These results may occur but the measure of them is not even estimated. Such uncertain elements can find no place in estimated future earning for reorganization valuation purposes."

The court was correct in its statement above that no measure of these post-war changes was made, insofar as the principal argument was concerned. Such an estimate would have been impossible at the time of the argument, which was held before the end of the war. But such an estimate, represented by the earnings figures for 1946, set forth above, up through July 31, was submitted in petitioner's petition for rehearing (R. 5719, 5756). No comment on this question in the light of these figures was made by the court in its order dismissing the petition (R. 5831).

REASONS RELIED ON FOR GRANTING THE WRIT

1. The Circuit Court, in holding adversely to petitioner's contentions on the first two questions above, has decided important questions of federal law which have not been but should be decided by this Court. This Court has recognized that unanticipated changed economic conditions since the adoption of a reorganization plan by the Commission must be considered by the reviewing court and may be so extreme as to require the plan to be remanded to the Commission. *Ecker v. Western Pacific R. Corp., supra,* 506-509; *Group of Investors v. Milwaukee R. Corp.,* 318 U.S. 523, 542-544; *R.F.C. v. D.&R.G.W. R. Co.,* 90 L. Ed. 1134, 1143. While in those cases it has recognized that the existence of the intervening increased wartime earnings was not enough alone to require the plan to be set aside, it has not yet finally determined what more extreme changes of conditions may require setting aside a plan. Opinion of Mr. Justice Reed of August 6, 1946 in granting stay in *In re Equitable Office Building Corporation, Debtor,* (D.C.S.D. N.Y., No. 78,476) (Nos. 609 and 610, this Court, October term, 1946). Here the changes and the financial improvement have been so much more extreme than in any of those cases as to place the present case in an entirely different category. Unlike the situation in those cases, the long continued wartime earnings have been transmitted into debt reductions and accumulations of current asset balances, to a point where there is now actual solvency in the bankruptcy sense. In none of those cases, nor in any others, has the significance of intervening solvency in that sense been considered. So far as the second question is concerned, that question is also entirely

different from that considered in the earlier cases, since here earnings of a permanent peacetime nature much higher than those considered by the Commission are presented, whereas in those cases the intervening improved earnings were merely of the evanescent wartime type.

The importance in railroad bankruptcy administration of the whole question of whether stockholders' equities are now to be wiped out in the face of intervening greatly improved financial conditions is shown by the passage at the last session of Congress of the so-called Wheeler-Reed Bill (S. 1253). Under this legislation existing railroad reorganization plans would have been rejected and the debtors would have been allowed an 18-month period in which to accomplish agreement upon their plans of reorganization with the various interests involved. Although the bill was vetoed by President Truman, his veto message indicated that he was not opposed to the aim of the legislation, to prevent forfeiture of railroad securities in the reorganization process. Congressional leaders have publicly indicated that efforts to enact similar legislation will be forthcoming in the next session of Congress. It is significant that throughout the legislative hearings on this bill the present Debtor's case was cited as a *cause celebre* on the issue of the inequity of eliminating junior interests under present conditions.

2. In connection with the first question above, the Circuit Court's decision is in conflict with that of a District Court in another circuit. The District Court for the Northern District of Illinois in a memorandum opinion of June 28, 1946, in *In the Matter of Chicago, Rock Island and Pacific Railway Company, Debtor,* (D.C.N.D. Ill., No.

53209) (attached hereto as Appendix E)[10] remanded a plan of reorganization to the Commission, because of intervening financial improvement, as evidenced by debt retirement and increase in net asset balance, although that carrier had not attained the solvent position which this Debtor has now achieved.

3. As to the third question, the Circuit Court's conclusion that the Debtor's stock interest should be totally eliminated despite the existing conditions, amounts to a decision of a question of federal bankruptcy law which is in conflict with the decisions of this Court in *Ecker v. Western Pacific R. Corp., supra,* 475-476 and *R.F.C. v. D. & R.G.W. R. Co., supra,* 1141. The Circuit Court has brushed aside almost completely, the factor of intervening solvency in the bankruptcy sense in determining whether a stock claim is now valueless. It has said that the value of a claim is to be determined almost entirely by future earning power. Tested by that criterion also, the stock is obviously not valueless. Consequently, the Circuit Court's decision in effect amounts to a determination that a claim which is not valueless may be eliminated in a railroad bankruptcy reorganization. This is contrary to the statements of this Court in the above cases that only valueless claims may be eliminated.

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(10) This opinion was also attached as an exhibit to petitioner's petition for rehearing (R. 5759).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted.

Dated: January 13, 1947.

BEN C. DEY
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In the Supreme Court of the United States

OCTOBER TERM 1946

No. .....

SOUTHERN PACIFIC COMPANY, a railroad corporation, Intervener,

Petitioner,

vs.

BERRYMAN HENWOOD, as Trustee of ST. LOUIS SOUTHWESTERN RAILWAY COMPANY LINES, et al.,

Respondents.

Brief in Support of the Petition

OPINION BELOW

The opinion of the Circuit Court below (R. 5659-5683) is reported at 157 F.(2d) 337. The District Court's opinion (R. 5183-5213) is reported at 53 F. Supp. 914.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 26, 1946 (R. 5681). On September 9, 1946,

the court issued an order (R. 5683-5684) extending to September 25, 1946, the time for filing petitions for rehearing, which time under the court's rules would otherwise have expired on September 10, 1946. Petitioner filed a petition for rehearing on September 23, 1946 (R. 5711-5765), which was denied by order of October 22, 1946 (R. 5831). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. sec. 347(a)) and under Section 24 of the Bankruptcy Act, as amended (11 U.S.C. sec. 47 c). The latter section specifically gives this Court jurisdiction to review judgments of the Circuit Courts of Appeals in bankruptcy proceedings, which is the nature of the judgment here sought to be reviewed. Cases believed to sustain this court's jurisdiction include the following: *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448; *Group of Investors v. Milwaukee R. Co.*, 318 U.S. 523; *R. F. C. v. D. & R. G. W. R.R. Co.*, 90 L. Ed. 1134.

STATUTE INVOLVED

Section 77(e) of the Bankruptcy Act (11 U.S.C. sec. 205(e)) is here involved. Because of its length, it is reproduced as Appendix F to this brief.

STATEMENT

A statement of the matters involved is contained in the petition, *supra*.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In sustaining present application of the Commission's reorganization plan, as not inequitable to Debtor's stockholders, excluded from participation therein, when, in the interim between its adoption and the time of its application, the Debtor, through payments of indebtedness and accumulation of net current asset balances, has ceased to be insolvent and has achieved solvency, in the bankruptcy sense, by a wide margin.

2. In holding that intervening solvency in the sense of balance of assets over liabilities has small bearing on the equity to stockholders of present application of this plan under which they were denied participation.

3. In sustaining application of such plan, as not inequitable to stockholders, when, in the interim between its adoption and application, Debtor's post-war peacetime net income has soared to a much higher plane than the earlier pre-war peacetime level considered by the Commission as the basis for its valuation.

4. In holding that unprecedented industrial and population growth in the area served by the Debtor can find no place in estimated future peacetime earnings for reorganization valuation purposes.

5. In completely excluding Debtor's stockholders' claim from participation in the reorganization plan, when, at the time the plan is to be applied, Debtor's assets are in excess of its other obligations, and, at the same time, its earnings are sufficient to justify a valuation recognizing the claim.

6. In recognizing, in effect, that a claim which is not valueless may be lawfully excluded from participation in a reorganization plan.

SUMMARY OF ARGUMENT

1. The Circuit Court, in holding adversely to petitioner's contentions on the first two questions presented by the petition, has decided important questions of federal law which have not been but should be decided by this Court.

A. There can be no doubt that Debtor has experienced a vast financial improvement since the Commission's decision. It has progressed from a state of insolvency, by a margin of approximately $8,300,000 at the time of the Commission's decision, to a present state of solvency, in the bankruptcy sense, by a margin of at least $18,800,000.

Contrary to the Circuit Court's views, this present balance of assets over liabilities greatly bolsters Debtor's potential earning power. Such accumulation of assets may be used, as Debtor has, in fact, used earlier accumulations, either (1) to pay off the principal of existing indebtedness, so that future net income will not be depleted by interest charges on such indebtedness, or (2) to be plowed back into the business in the form of improvements in service, equipment and efficiency, so that future gross and net earnings will again be increased. In view of the importance of earning power as a criterion for valuation purposes, it is evident that the existence of this present solvent condition which directly enhances earning power, is, contrary to the Circuit Court's position, extremely signi-

ficant in determining the present equity of applying the plan. The present valuation eliminating Debtor's stockholders is grossly inequitable in that it necessarily did not take into account this intervening improved condition.

Apart from its present solvency, Debtor's actual peacetime earning power is substantially above that of the pre-war era considered by the Commission as the basis of its valuation. This is evident from the fact that its 1946 net income available for fixed charges is from two to six times the comparable figures for the pre-war period relied upon by the Commission, and is better than that of the railroads generally. Such high peacetime earnings, unlike war earnings, may be considered a reliable gauge of Debtor's long term future because of the intervening phenomenal industrial development and population growth of the area served by Debtor, and because of the recent action of the Interstate Commerce Commission in awarding substantial rate increases generally to railroads. The Circuit Court erred in dismissing these fundamental industrial and population changes as uncertain elements having no value as an aid to the estimation of future earnings for valuation purposes.

The plan is also grossly inequitable in the light of this great increase in the long term level of Debtor's earnings. This is evidenced by the fact that Debtor's 1946 income available for fixed charges is nearly three times an amount equalling the annual charges ahead of common stock which the Commission found would suffice to service its prescribed capitalization.

B. In the *Western Pacific, Milwaukee,* and *Denver & Rio Grande* cases this Court has recognized that intervening unanticipated changes in economic conditions may be

so extreme as to require a reorganization plan to be remanded to the Commission, although it found that the particular changes in those cases were not of this nature. The question as to what more extreme changes may require setting aside a plan was left open. The fact that Debtor has attained solvency and the fact that its post-war peacetime earnings are at a much higher level than the pre-war level constitute changes so much more extreme than the changes in the above cases, as to place them in an entirely different category. In none of those cases was an increased level of earnings of a peacetime variety presented. In none of them had the situation progressed to a point where there had been substantial debt reductions. In none of them had the carriers achieved or even closely approached a condition of actual solvency in the bankruptcy sense.

C. The importance in railroad bankruptcy administration of the whole question of whether stockholder equities are to be wiped out is shown by the passage at the last session of Congress of the so-called Wheeler-Reed bill (S. 1253). This legislation, which would have required the rejection of existing reorganization plans, was impelled by wide-spread public complaint against the tendency of existing plans to eliminate stockholder interests. Although the bill was vetoed by the President, he indicated at the time that he was in agreement with the aim of the legislation to prevent forfeiture of railroad securities. Congressional leaders have indicated that similar legislation, modified to meet the President's objections, will be presented at the new Congress. It is highly significant that throughout the Congressional hearings the present Debtor's plan was constantly referred to as a particularly flagrant

example of erroneous elimination of equity interest. Clearly, if any changes are of a magnitude to require setting aside a plan, and if this Court's statements in the earlier cases are not meaningless dicta, then the changes in the present case are of this type.

2. The Circuit Court's decision is in conflict with that of a District Court in another circuit, namely that of the District Court for the Northern District of Illinois in *In the Matter of the Chicago, Rock Island and Pacific Railway, Debtor,* (D.C.N.D. Ill., No. 53209). In that case a reorganization plan was set aside because of a showing of debt reduction and asset balance improvement, which, while impressive, had not brought that carrier to the solvent state occupied by Debtor.

3. The Circuit Court's decision is in conflict with the decisions of this Court in the *Western Pacific* and *Denver & Rio Grande* cases. It is evident from the Circuit Court's decision that it largely rejected solvency in the bankruptcy sense as of importance for valuation purposes in favor of an actual earnings test. Even from the standpoint of actual earnings it is clear that the stockholders' claim cannot reasonably be considered valueless. Under the circumstances, the Circuit Court's decision amounts to a holding that even a claim which is not valueless may be eliminated from participation in a reorganization plan. This is contrary to the statements of this Court in the above two cases that only valueless claims may be thus eliminated.

ARGUMENT

1. THE CIRCUIT COURT, IN HOLDING ADVERSELY TO PETITIONER'S CONTENTIONS ON THE FIRST TWO QUESTIONS PRESENTED BY THE PETITION, HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

A. There Can Be No Doubt That Debtor Is Today Solvent in the Bankruptcy Sense by a Large Margin, that Its Permanent Post-War Peacetime Earning Power Is Greatly in Excess of the Pre-War Earning Power Considered by the Commission as the Basis of Its Valuation and that the Existence of Either of These Conditions Makes Present Application of the Plan With Its Elimination of Stockholder Participation, Grossly Inequitable.

As shown in the statement in the petition, Debtor, in the years since the Commission's supplemental decision, through retirement of its debt and accumulation of a large net current asset balance, has achieved a truly impressive financial improvement. It has progressed from insolvency at the time of the Commission's decision by about $8,300,000 to solvency by at least $18,800,000, as of October 31, 1946.

The Circuit Court in its opinion endeavors to minimize this improvement by pointing out that petitioner has understated Debtor's outstanding indebtedness by $11,901,930, as of October 31, 1944 (R. 5670-5671). This figure represents the difference between the principal and interest due on the notes owned by Southern Pacific Company, Chase National Bank and Mississippi Valley Trust Company and the principal and interest due on the Debtor's General and Refunding bonds pledged as security for such notes. This difference, says the court, is allowable to these creditors under *In re Chicago & N. W. Ry.*

Co. (C.C.A. 7), 126 F. (2d) 351, cert. denied 318 U.S. 793, and *In the Matter of New York, N. H. & H. R. Co.* (C.C.A. 2), 147 F. (2d), 40, 47-48, cert. denied 325 U.S. 884.

In answer to this contention it may be said first that even if the court is completely correct, owing to the continued improvement in Debtor's condition, if the above $12,000,000 item is deducted from its margin of solvency of $18,800,000 (as of October 31, 1946), it would still be solvent in the bankrupty sense by the substantial margin of $6,800,000. Furthermore, it is to be noted that the Commission in its report has not so dealt with this matter. How it should deal with the notes and collateral under these circumstances may be determined by it if the plan is referred back to it. This question, like questions of the amount and type of capitalization, is, so long as the Commission follows legal standards, an administrative question with which the courts should not attempt to deal in the first instance. Cf. *Ecker v. Western Pacific R. Corp., supra,* 473; *Group of Investors v. Milwaukee R. Co., supra,* 544. Certainly the existence of the collateral will be duly recognized in the reorganization, but this may be by improvement in the quality of the security given to the note holders or by the payment of the notes in cash as was done in *Erie R. Co., Reorganization,* 239 I.C.C. 653, 724. It is not necessarily true that the creditor claims ahead of the stock will be expanded by reason of the pledge of collateral to secure the notes.

It may be readily demonstrated just how Debtor's intervening accumulation of a substantial net current asset balance, its substantial debt reductions and its present solvent condition in the bankruptcy sense, make the exclusion of stockholders in the proposed plan grossly in-

equitable. The Circuit Court has erroneously taken the position that there is little connection between solvency in this sense and the Debtor's earning power. Consequently, since that court regards earning power as the paramount criterion for reorganization valuation purposes, it has erroneously concluded that solvency in the sense of balance of assets over liabilities has small bearing on the present equity of the plan (R. 5662-5663). In point of fact there is a very close connection between solvency in this sense and the Debtor's potential earning power. These accumulations of assets may be used in two ways: (1) to pay off the principal of existing indebtedness (as Debtor has done in the past) so that future net earnings, which would otherwise have to be depleted by interest charges, will be increased; (2) to be plowed back into the business in the form of countless improvements in service, equipment and efficiency (as the Debtor has done also), so that future gross and net earnings will be increased. In either event the existence of this solvent condition greatly bolsters Debtor's potential earning power and the present worth of such earning power. Plainly apparent is the inequitable nature of Debtor's reorganization plan providing for a present worth valuation excluding stockholders, which necessarily did not take into account this subsequently developing improved condition.

Ironically enough, furthermore, the retirement, since the formulation of the plan, of a substantial amount of Debtor's indebtedness, which makes the $75,000,000 valuation inequitably low, may, under the provisions of the plan, result in an even lower capitalization for Debtor. This follows from the provision of the Commission's supplemental order (R. 3790) that the $75,000,000 capitaliza-

tion is "subject to variation to the extent, if any, that matured interest proposed to be funded in the plan is paid, —and as equipment obligations or other liabilities are paid or reduced . . ." This language is open to the interpretation that the total capitalization of Debtor is to be reduced by such amounts. As pointed out in the petition (pg. 9), Debtor has now paid off a total of $15,105,483 of principal and interest which was funded in the plan. Consequently, it is possible, if the existing plan is now put into effect, that Debtor's capitalization will be only about $60,000,000, and the already extreme inequity of the plan will be heightened by about $15,000,000. The plain truth is that the plan is obsolete and unworkable and the sooner it is returned to the Commission for revision, the better are the chances of the Debtor's emerging from reorganization.

Nor can there be any doubt that, apart from its present solvency, Debtor's actual long term post-war earning power is substantially above that of the pre-war era considered by the Commission as the basis for its valuation. As pointed out in the statement (petition, pg. 11), Debtor's income available for fixed charges during the full peacetime year 1946 will probably be about $7,000,000, anywhere from two to six times the comparable figures for the pre-war period from 1930 through 1940, upon which the Commission primarily relied. It is especially significant that, as the petition shows (pg. 12), the Debtor's post-war earnings are, on the evidence to date, much better than those of the railroads generally. Such earning power, as also pointed out in the petition (pgs. 12-14), because of the phenomenal industrial development and population growth of the area served by Debtor, and the

recent award by the Interstate Commerce Commission of substantial increases in rates to the railroads generally, bids fair to continue for the indefinite future. On the face of things, it plainly is not rational to dismiss such substantial population and industrial changes, in the Circuit Court's cavalier fashion as "uncertain elements" which "can find no place in estimated future earnings for reorganization valuation purposes" (R. 5658). Debtor's greatly increased post-war peacetime earnings, based as they are, on such fundamental economic changes, have a much sounder basis for permanence than the unprecedented high wartime earnings which this Court has heretofore in the *Milwaukee* and *Western Pacific* cases regarded as purely temporary and as an "unreliable norm" for the indefinite future. It is difficult to see why these post-war earnings should not be regarded as a much more reliable gauge for the long term future than the earnings of the "Dust-Bowl" era upon which the Commission necessarily relied.

The plan is also grossly inequitable in the light of this great increase in the post-war level of Debtor's earning power over the pre-war level considered by the Commission as the basis for its valuation. As pointed out in the petition (pg. 11), Debtor's 1946 income available for fixed charges, about $7,000,000, is nearly three times the annual charges of $2,451,228 ahead of common stock (consisting of $1,513,723 interest and $937,505 preferred stock dividends) which the Commission found would suffice to service its prescribed pre-war based capitalization. Patently under these circumstances the Commission's position that the Debtor's earnings will not comfortably support a higher valuation which would give something

to its stockholders is completely without rational basis. The inequity of the plan from this standpoint is further accentuated when consideration is taken of the fact, now well recognized, that interest rates on new capital are now generally considerably lower than they were during the pre-war period considered by the Commission. Consequently, the Debtor's bonds provided for in the plan could be readily refunded with lower interest bonds, so that in actual fact the same amount of net earnings in the future could satisfy the annual charges on a considerably higher capitalization than was the case when the Commission prescribed Debtor's capitalization.

B. The Questions Presented Have Not Been But Should Be Decided By This Court.

This Court has consistently recognized that unanticipated changed economic conditions since the adoption of a reorganization plan by the Commission must be considered by the reviewing court and may be so extreme as to require the plan to be remanded to the Commission. *Ecker v. Western Pacific R. Corp., supra,* 506-509; *Group of Investors v. Milwaukee R. Corp., supra,* 542-544; *R.F.C. v. D. & R.G.W. R. Co., supra,* 1143, 1148. Although in those cases the particular changes in conditions were held not to require the plans to be set aside,[11] it is evident that this

(11) Mr. Justice Frankfurter issued a subsequently published dissenting opinion in the *Denver & Rio Grande* case, reported at 91 L. Ed. 22. He took the position that irrespective of whether the changed conditions made application of the plan intrinsically inequitable, they did afford reasonable justification for the action of a particular class of creditors in rejecting it. That plan had reached an administrative stage beyond the present one, having been submitted to a vote of the various classes of creditors, and having been judicially confirmed over the dissenting vote of one class of creditors. Justice Frank-

Court has not settled the question as to what more extreme changes may require setting aside of a plan. Thus Mr. Justice Reed who wrote the opinion in two of the above cases remarked on August 6, 1946, in an opinion granting a stay[12] in *In Re Equitable Office Building, Debtor*, D.C.S.D. N.Y., No. 78,476) (Nos. 609 and 610, October term, 1946, in this Court):

> "The effect of unanticipated changes of economic conditions after confirmation on the propriety of subsequent action by the reorganization court to protect the interests of junior creditors also has not been judicially determined finally. Compare *R.F.C. v. D. & R.G.W. R. Co.*, 90 L. Ed. 1134, 1148; *Ecker v. W.P.R. Co.*, 318 U.S. at 506-509."

The changes of economic conditions in the present case ((1) payment of debts, development of a net current asset balance, so that insolvency has been changed to solvency by a wide margin, and (2) post-war peacetime earnings at a much higher level than the pre-war earnings considered by the Commission) are so much more extreme than those considered in the above three cases as to place them in an entirely different category. In none of those cases

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furter was considering the further condition in Section 77 of the Bankruptcy Act, not involved at the present stage, that where any class of creditors has rejected a plan, it can prevail only where the District Court finds that such rejection "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts."

(12) Although this Court denied certiorari of the District Court's decision involved in that case on November 25, 1946, (Nos. 609 and 610), it did not disturb the stay, which will presumably continue in effect until an appeal taken in the same case to the Circuit Court has been disposed of and until an application for certiorari from the latter decision has been passed upon.

was the question of the significance of an increased level of permanent peacetime earnings presented, the earnings there involved being only of the temporary wartime nature. In none of those cases had the situation progressed to the further step where wartime earnings were converted, as they have been here, into substantial debt reductions. In none of those cases had there been even a close approach to actual solvency in the bankruptcy sense, such as exists here, so that the question of the significance of intervening solvency in this sense, here presented, was not there involved.

That there had not been an approach to solvency even in the *Rio Grande* case, wherein the improvement was greater than in any of these earlier three cases, is readily demonstrated by an examination of the facts of that case, as they appear in this Court's decision (90 L. Ed. 1138, 1144). The capitalization adopted for the Rio Grande, without consolidation with the Denver & Salt Lake, effective December 31, 1942, was approximately $143,000,000. On that same date, the total of long term debt and deferred liabilities was approximately $175,000,000 and the balance of current assets over current liabilities, reflected in the above capitalization, was approximately $7,000,000. The road was then clearly insolvent, in the sense of balance of liabilities over assets, by about $32,000,000. By December 31, 1944, there had been a considerable improvement on the asset side. There was now a current asset balance over current liabilities of about $12,000,000, an improvement of $5,000,000 over the previous balance. There was also a net addition to capital account of about $30,000,000. This $35,000,000 improve-

ment in assets would have wiped out the previous insolvency, except for the fact that the total of long term debt and deferred liabilities had in the meantime increased by $9,000,000 to $184,000,000. Consequently, the road, though in greatly improved condition as a result of earnings in the two-year period subsequent to the effective date of the plan, was still insolvent by $6,000,000.

The *Rio Grande* case is sharply distinguishable on yet another round, namely, that the changes there were anticipated by the Commission, whereas those now presented could not have been. That this factor was the real reason for this Court's refusal to remand the plan in that case is evidenced by the following statement from its opinion (90 L. Ed. at 1148):

> "Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan."

In that case the Commission's approval of the plan was entered on June 14, 1943, a year and a half after hostilities had been going on, and the wartime improved conditions relied upon extended only through December 31, 1944. There was some reason to surmise that with that much wartime experience before it, the Commission could have foreseen what the carrier's wartime future would have been. Contrast that situation with the one now presented. Here the Commission's last order was entered on

March 9, 1942 on a submission of October 8, 1941, so that the Commission could consider only pre-war conditions, or, at the most, conditions during the first three months of hostilities. Furthermore, the changed conditions involved extend to a much more distant time, that of the peacetime era of 1946. It seems beyond comprehension that the Commission could have foreseen, on the basis of this pre-war record, what cataclysmic changes in Debtor's economy would have been wrought before peace once more returned.

C. The Questions Presented Are Important In the Administration of the Federal Bankruptcy Act.

The importance in federal railroad bankruptcy administration of the whole question of whether stockholder equities are now to be wiped out in the face of intervening greatly improved financial conditions is shown by the passage at the last session of Congress of the so-called Wheeler-Reed bill (S. 1253). Under this legislation, existing railroad reorganization plans would have been rejected and the debtors would have been allowed an 18-month period in which to accomplish agreement upon their plans of reorganization with the various interests involved.

That there was terrific public pressure behind this legislation and that the reason for this pressure was primarily the elimination of stockholder interests despite intervening greatly improved financial conditions of the carriers, is evidenced by the following statements at the hearing on this bill by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, and one of the sponsors of the legislation:

"The Chairman. The reason we have tried to work out something in this committee is because of the terrific pressure that has been put on the committee and the Congress by Members of the Senate and their own constituents to pass the Hobbs bill. We have tried to work out something not as drastic as the Hobbs bill."[13]

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"If you had not had these changed conditions there would not have been this complaint we have from all the country, from stockholders and bondholders and everybody else. I just don't believe that the Commission ought to hesitate at all to say that in view of the changed conditions there ought to be some changes."[14]

In answer to Senator Wheeler's last remark Commissioner Mahaffie of the Interstate Commerce Commission, appearing before the Committee, replied:

"Well, I think that there should and would be no hesitancy at all."

This indicates that the Commission now believes that if some of the reorganization plans were now remanded to it, changes would have to be made in order to make them equitable in the light of existing conditions.

Although the above bill was vetoed by President Truman and did not become law, it is clear that the President did not mean to indicate that he was opposed to the aim of the legislation to prevent forfeiture of railroad securities in the reorganization process. Thus, he wrote in a Memorandum of Disapproval, dated August 13, 1946:

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(13) Hearings before the Senate Committee on Interstate Commerce on S. 1253 (79th Congress, 2nd session). (Pg. 412).

(14) *Ibid.* pg. 516.

"By withholding my signature to this bill I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with those objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities."

Shortly afterwards four members of the House and Senate Conference Committee which wrote the vetoed version of the bill issued a statement to the effect that a revised and broadened version of the bill to meet President Truman's objections would be promptly introduced in the next session of Congress.[15]

It is highly significant that throughout the Congressional hearings and committee reports which led to the passage of this bill the reorganization plan of the present Debtor was constantly alluded to as a particularly flagrant example of erroneous elimination of equity interest. Likewise, the continuation of the trusteeship of the Debtor was referred to as particularly unconscionable in view of present improved conditions. An example is the following colloquy at the Senate Committee hearing on this bill between Senator Wheeler and Commissioner Mahaffie of the Interstate Commerce Commission:[16]

"The Chairman. It seems to me the Interstate Commerce Commission might at least make a suggestion

(15) Reported in the Wall Street Journal for August 15, 1946.

(16) Hearings before the Senate Committee on Interstate Commerce on S. 1253 (79th Cong. 1st Session), October 31, 1945, p. 10. The same conversation is incorporated at page 49 of the Senate report on the investigation of the trusteeships under section 77 of the Bankruptcy Act, S. Rep. No. 925 (79th Cong. 2nd Session). See also pages 39, 49, 50, 52, 54, 58, 60, 61 and 62 of that report for references to the Debtor's situation.

to some of the courts to the effect that some receivers or trustees or lawyers should step up matters. According to figures I have your Commission shows the Cotton Belt[17] has in 4½ years earned its annual interest charges 42 times and also about $150 a share on its stock. What possible reason can there be for keeping a road in that condition in the hands of receivers?

Mr. Mahaffie. We approved a plan in March 1942 in the case of the Cotton Belt Railroad. It was approved by the United States district court in charge of the property, but an appeal from that decision has been pending and is not yet decided. It is in the circuit court of appeals. I am not sure the circuit court of appeals would appreciate suggestions from us as to how it can do its business.

The Chairman. Well, if that railroad is bankrupt a lot of us would like to be declared bankrupt on the same basis.'"[18]

The especially excellent financial record of this Debtor during its reorganization is also emphasized by the following passage from the report of the Senate Committee on Investigation of Trusteeships under Section 77, S. Rep. 925 (79th Cong. 2nd Session), p. 39:

"Even taking only their common stock, five of the railroads above listed, still in the reorganization

(17) The popular name for the Debtor.

(18) Freeman Cleaves, a financial writer, in an article appearing in the financial section of the New York World-Telegram for April 6, 1946, (pg. 13) declares:

"The St. Louis Southwestern Railway (Cotton Belt Route) is obviously the best situated among the reorganization railroads which could be returned to the debtor corporation under bills now pending in Congress."

courts, have excelled the average for all the railroads, the bulk of them solvent in form as well as in fact. Compared with the average for the industry as a whole: Chicago, Rock Island & Pacific did one and one-half times as well; Denver & Rio Grande did one and one-half times as well; Gulf Coast Lines did two and one-third times as well; Missouri Pacific did one and one-half times as well; St. Louis Southwestern did three and one-half times as well."

This case tests whether this Court will, as assumed in *Ecker v. Western Pacific R. Corp. supra,* and *Group of Investors v. Milwaukee R. Corp, supra,* refer a railroad plan of reorganization back to the Commission because of improvement in the railroad's financial condition of any magnitude, or whether the expressions of the Court in those cases are to be deemed dicta to be now disregarded. For if any plan of reorganization is to be sent back to the Commission for reconsideration because of improvement subsequent to the Commission plan, this is it.

2. THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH THAT OF A DISTRICT COURT IN ANOTHER CIRCUIT.

The Circuit Court's decision that, despite Debtor's improvement in its net current asset picture, its substantial debt retirements and its present solvency, the plan need not be remanded to the Commission, is in sharp conflict with the recent decision of a district court in another circuit. This is the memorandum decision of June 28, 1946 of the United States District Court for the Northern District of Illinois in *In the Matter of the Chicago, Rock Island and Pacific Railway, Debtor, supra,* which is attached hereto as Appendix E. In that decision

the Rock Island reorganization was set aside on a showing of asset balance improvement and debt reduction comparable to that in the present case.

The improvement upon which Judge Igoe's decision was based in that case is described in the following two paragraphs of his decision:

> "In the present case we have a plan that except for slight modifications was prepared by the Commission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond.
>
> Against that we find the Debtor today with cash, or equivalent of over $70,000,000.; with an R.F.C. loan aggregating, principal and interest, in excess of $18,000,000.00, paid in full; with the entire first mortgage of the Peoria Terminal Co., to all intents and purposes paid in full; with over 20% of the Choctaw & Memphis first mortgage retired; and with an amazing reduction, in the interim, of equipment debt. Three classes of creditors set up in the original Plan have disappeared—the banks, the R.F.C., and the Peoria Railway Terminal Co.

It is to be noted from an examination of this decision and the Interstate Commerce Commission's decision in that case (*Chicago, R. I. & P. Ry. Co., Reorganization*, 257 I.C.C. 307, 318) that while the Rock Island's financial improvement was impressive, that carrier had by no means attained the condition of solvency achieved by the present Debtor. The above decision of the Commission (p. 309), points out that on January 1, 1944, there was an unsatisfied deficiency of over $80,000,000 in the provision made for creditors' claims, so that as of that date the carrier may be considered insolvent by that margin. The court, in discussing subsequent improvement in the car-

rier's debt picture, speaks of the following: reduction of equipment trust certificates, payment of R.F.C. note and interest, payment of bank notes, payment of Peoria Terminal Company mortgage, and payment of about 20 percent of the Choctaw & Memphis mortgage. The Commission states (257 I.C.C. 318) that the Rock Island's equipment trust indebtedness as of January 1, 1944, was $11,909,000. As of December 31, 1945, it was $8,155,833 (Moody's Steam Railroads, 1946, pg. 386), an improvement of $3,753,167. The Commission's decision (257 I.C.C. 318) sets forth the bank indebtedness, R.F.C. indebtedness and Peoria Railway Terminal Mortgage, all described by the court as paid, respectively as follows: $6,013,629, $20,849,015 and $928,000. In addition the court states that about 20 percent of the Choctaw & Memphis mortgage had been paid off. Since the Commission's decision (257 I.C.C. 318) lists the total of that item as $5,286,000, an additional amount of $1,057,200, representing 20 percent of the above figure, should be added to the improvement column. Finally, it is to be noted that as of January 1, 1944, the Rock Island's net current asset balance was $65,332,541, whereas on December 31, 1945, it was $67,643,340, (Moody's Steam Railroads, 1946, pg. 386) an improvement of $2,310,-799. Adding the last figure to the above reduction figures gives a total improvement of about $35,000,000. This means that as of the time of the court's decision in that case the Rock Island was still insolvent by about $55,000,000. Yet its reorganization plan was set aside. On the other hand, in the present Debtor's case, a reorganization plan, which likewise eliminates stockholders, is held not inequitable, although Debtor has attained solvency by a margin of $18,600,000.

3. THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Circuit Court has remarked in its decision (R. 5662):

> "The fact that the physical properties, including cash and liquid securities, may have a value beyond the total indebtedness is not controlling either at the beginning or during such reorganization proceedings."

It further remarked (R. 5663):

> ". . . it is clear that the moving consideration with the Commission was earnings—as it should have been."

From these statements it is apparent that the court largely rejected solvency in the bankruptcy sense as of importance for valuation purposes in favor of an actual earnings test.

Leaving aside the fact, already shown, that the Debtor's present solvency greatly bolsters its potential earning power, it is to be recalled that, even on the basis of the court's own criterion of actual earnings, it has been amply demonstrated that the stockholders' claim is not valueless. It is apparent, therefore, that the court's decision thus amounts to the proposition that a claim which is not valueless may, nevertheless, be validly eliminated from participation in a bankruptcy reorganization plan.

Such a proposition is fundamentally opposed to the position taken by this Court in the *Western Pacific* and *Denver & Rio Grande* cases that only valueless claims may be validly eliminated. In the former case this Court said (318 U.S. at 475, 476):

". . . We hold that the elimination of the claims of stockholders and creditors which are valueless from participation in the reorganization is in accordance with valid provisions of S. 77(e)".

In the latter case, the court remarked (90 L. Ed. at 1141):

"At this point, we restate our conclusion reached in the former cases that the Congressional authority to the Commission to eliminate valueless claims from participation in reorganization is a valid exercise of the federal bankruptcy power."

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue.

Dated: January 13, 1947.

BEN C. DEY
GEORGE L. BULAND
ROBERT L. PIERCE
65 Market St.,
San Francisco 5, Calif.
CLAUDE O. PEARCY,
418 Olive St.,
St. Louis 2, Mo.
Attorneys for Petitioner.

(APPENDICES FOLLOW)

Appendix

APPENDIX A

ST. LOUIS SOUTHWESTERN RAILWAY LINES
Berryman Henwood, Trustee

Income Account Month of October, 1946
and Ten Months 1946

	October, 1946	January 1 to October 31, 1946
RAILWAY OPERATING REVENUES:		
Freight	3 923 442 09	35 173 316 20
Passenger	141 398 97	1 571 517 14
Mail	26 811 92	259 914 08
Express	33 449 08	289 782 53
Miscellaneous transportation	27 023 73	240 709 29
Incidental	55 531 20	571 857 06
Joint facility (Net)	1 773 96	19 790 51
Total	4 209 430 95	38 126 886 81
RAILWAY OPERATING EXPENSES:		
Maint. of Way & Structures	611 348 21	6 389 177 24
Maint. of Equipment	491 143 82	5 689 629 81
Traffic	123 037 39	1 196 526 14
Transportation	1 306 092 98	12 393 453 03
Miscellaneous Operations	36 135 73	372 011 68
General	112 891 09	1 127 437 17
Total	2 680 649 22	27 168 235 07
Net rev. from ry. oper's.	1 528 781 73	10 958 651 74
RAILWAY TAX ACCRUALS:		
State, County & City taxes	82 998 87	831 222 58
Federal income tax	384 049 28	2 150 193 15
Fed.inc.tax-adj. 1941 & 1945	Cr. 47 162 98	Cr. 403 095 39
Other federal taxes	118 996 06	1 196 315 93
Total	538 881 23	3 774 636 27
Railway operating income	989 900 50	7 184 015 47
RENT INCOME:		
Rent from locomotives	-	1 740 45
Rent from pass. train cars	771 93	25 001 26
Rent from work equipment	27 00	643 54
Joint facility rent income	27 659 89	281 135 79
Total	28 458 82	308 521 04
RENTS PAYABLE:		
Hire of frt. cars-Dr. bal.	74 292 71	995 685 83
Rent for locomotives	6 90	29 94
Rent for pass. train cars	55 162 05	84 012 86
Rent for work equipment	-	274 75
Joint facility rents	79 070 71	755 267 72
Total	208 532 37	1 835 271 10
Net rents - Debit	180 073 55	1 526 750 06
Net railway optg. income	809 826 95	5 657 265 41

Continued on next page

Appendix

ST. LOUIS SOUTHWESTERN RAILWAY LINES
Berryman Henwood, Trustee

Income Account Month of October, 1946
and Ten Months 1946

	October, 1946	January 1 to October 31, 1946
Brought forward	809 826 95	5 657 265 41
OTHER INCOME:		
Income from lease of rd. & equip.	836 26	8 362 60
Miscellaneous rent income	2 383 94	36 587 93
Misel. nonoptg. phys. property	961 50	11 281 85
Income from funded securities	4 329 86	35 553 60
Income from unfd. sec. & accts.	15 920 00	218 617 93
Miscellaneous income	136 22	1 009 58
Total	24 567 78	311 413 49
Total income	834 394 73	5 968 678 90
MISCELLANEOUS DEDUCTIONS FROM INCOME:		
Miscellaneous rents	29 00	316 41
Miscellaneous tax accruals	656 26	656 26
Maint. of invest. organization	-	201 10
Misel. income charges	5 910 40	17 873 66
Total	6 595 66	19 047 43
Inc. avail. for fixed chgs.	827 799 07	5 949 631 47
FIXED CHARGES:		
Rent for leased roads & equip.	1 146 81	11 248 18
Interest on funded debt (fixed)	249 852 89	2 483 068 37
Interest on unfunded debt	162 46	9 229 80
Total	251 162 16	2 503 546 35
Net income	576 636 91	3 446 085 12
DISPOSITION OF NET INCOME:		
Bal. of inc. transferred to Earned Surplus	576 636 91	3 446 085 12

St. Louis, Missouri, December 11, 1946

Appendix

CERTIFIED COPY

D. C. Form No. 30

United States of America
Eastern District of Missouri } ss:

I, James J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Income Account for October 1946 and ten months of 1946, filed December 11, 1946 with STATEMENTS OF ASSETS AND LIABILITIES OF THE DEBTORS AS OF OCTOBER 31, 1946, AND CONSOLIDATED STATEMENT OF REVENUES AND EXPENSES OF THE DEBTORS FOR THE MONTH OF OCTOBER, 1946, In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings For the Reorganization of a Railroad, No. 5997, and

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Missouri this 11th day of December, A. D. 1946

JAMES J. O'CONNOR
Clerk.

By Annina W. Kinder
Deputy Clerk.

No. 8497

United States District Court

Eastern DISTRICT OF Missouri

In the matter of

St. Louis-Southwestern Railway Company,

Debtor.

CERTIFIED COPY

APPENDIX B

ST. LOUIS SOUTHWESTERN RAILWAY LINES
Berryman Henwood, Trustee
COMPARATIVE GENERAL BALANCE SHEET OCT., 1946-1945 ELIMINATING INTER-COMPANY ITEMS

ASSETS	Oct. 31, 1946	Oct. 31, 1945	+ Increase - Decrease
INVESTMENTS			
Road and equipment property	$136 538 870 43	$135 861 264 40 +	677 606 03
Improvements on leased property	38 443 24	33 708 52 +	4 734 72
Less:			
Donations and grants	317 830 86	309 028 72 +	8 802 14
Accrued depreciation-Road	591 070 73	814 808 71 -	223 737 98
Accrued depreciation-Equipment	11 892 479 48	11 513 581 46 +	378 898 02
Acod.amort.of defense projects-Rd	1 356 404 75	897 042 49 +	459 362 26
Acod.amort.of defense projects-Eq	4 322 914 16	3 082 133 06 +	1 240 781 10
Net investment in Road & Equip	118 096 613 71	119 278 378 48 -	1 181 764 77
Capital and other reserve funds	160 186 65	120 186 65 +	40 000 00
Miscellaneous physical property	275 368 28	281 286 15 -	5 917 87
Investments in affiliated companies:			
(A) Stocks	2 447 507 00	2 447 507 00	-
(B) Bonds	816 004 00	816 004 00	-
(C) Other secured obligations	7 376 27	90 585 48 -	83 209 21
(E) Investment advances	1 213 812 56	1 218 573 38 -	4 760 82
Other investments:			
(A) Stocks	54 48	54 48	-
(B) Bonds			
Second Mortgage Income Bonds	6 957 500 00	6 957 500 00	-
(E) Advances	8 112 69	- +	8 112 69
Total investments	129 982 535 64	131 210 975 62 -	1 227 539 98
CURRENT ASSETS			
Cash	1 281 303 54	743 917 11 +	537 386 43
Temporary cash investments	21 708 620 00	32 840 625 00 -	11 132 005 00
Special deposits	1 385 961 75	1 336 321 15 +	49 640 60
Traffic and car-service balance-Dr	1 944 736 64	773 373 84 +	1 171 362 80
Net bal.receivable from agts.& conds	468 468 81	363 176 09 +	105 292 72
Miscellaneous accounts receivable	1 499 962 53	2 439 367 64 -	939 405 11
Material and supplies	4 110 997 63	4 490 108 69 -	379 111 06
Interest and dividends receivable	16 800 00	16 800 00	-
Accrued accounts receivable	104 913 48	447 256 29 -	342 342 81
Excess profits tax refund bonds	-	744 072 80 -	744 072 80
Other current assets	24 083 08	16 127 69 +	7 955 39
Total current assets	32 545 847 46	44 211 146 30 -	11 665 298 84
DEFERRED ASSETS			
Working fund advances	39 476 49	38 566 61 +	909 88
Insurance and other funds	76 500 00	- +	76 500 00
Post war refund credit	-	3 002 648 97 -	3 002 648 97
Other deferred assets	28 393 69	27 562 02 +	831 67
Total deferred assets	144 370 18	3 068 777 60 -	2 924 407 42
UNADJUSTED DEBITS			
Prepayments	22 536 99	13 806 40 +	8 730 59
Other unadjusted debits	741 071 67	349 113 35 +	391 958 32
Total unadjusted debits	763 608 66	362 919 75 +	400 688 91
GRAND TOTAL	163 436 361 94	178 852 919 27 -	15 416 557 33

ST. LUCIA CO-OPERATIVE CREDIT UNION
Anytown Branch, Treetop
CONSOLIDATED FINANCIAL BALANCE SHEET OF ... AND ALL ITS SUBSIDIARIES OVER ... YEARS
(000's omitted)

ASSETS	20..	20..	20..	20..	20..
CURRENT ASSETS					
Cash and equivalents (treasury)					
Investments in Income properties					
Loans:					
Overdue and pledge					
Secured Depreciation-Equipment					
Secured Depreciation-Equipment					
Accounts receivable Medicare provider-Dr					
Accounts receivable Patients provider-Dr					
Due investments in fund & Equip					
Capital and other reserve funds					
Intellectual physical property					
Investments in affiliated companies:					
(A) Stocks					
(B) Bonds					
(C) Other secured obligations					
(D) Unsecured advances					
Other investments:					
(A) Stocks					
(B) Bonds					
Unsecured foreign income bonds					
(C) Advances					
Total investments					
CURRENT LIABILITIES					
Loans					
Temporary bank overdrafts					
Special deposits					
Profits and contingencies					
Net Del Corporation & Corp Equity					
Allowance for doubtful accounts					
Retained and undistributed					
Current portion of long-term debt					
Current portion of long-term debt					
Current portion of long-term debt					
Current portion of long-term debt					
Current portion of long-term debt					
Current portion of long-term debt					
Other current liabilities					
DEFERRED CREDITS					
Reserve for contingencies					
Income taxes					
Other deferred credits					
SHAREHOLDERS' EQUITY					
Preferred stock					
Common stock					
Retained earnings					
Total shareholders' equity					

ST. LOUIS SOUTHWESTERN RAILWAY LINES
Berryman Henwood, Trustee
COMPARATIVE GENERAL BALANCE SHEET OCT., 1946-1945 ELIMINATING INTER-COMPANY ITEMS

	Oct. 31, 1946	Oct. 31, 1945	+ Increase - Decrease
LIABILITIES			
Capital stock - Common	$ 17 186 100 00	$ 17 186 100 00	$ -
Preferred	19 893 600 00	19 893 600 00	-
Total stock	37 079 700 00	37 079 700 00	-
LONG TERM DEBT			
Funded debt unmatured:			
First Mortgage Bonds	20 950 000 00	20 950 000 00	-
Second Mortgage Income Bonds	10 000 000 00	10 000 000 00	-
Texarkana Union Sta.Tr.Ctfs.Ser."A".	315 000 00	315 000 00	-
Debt in default:			
First Mortgage Bonds	3 173 894 68	3 173 894 68	-
First Terminal & Unify.Mtg.Bonds	8 063 000 00	8 063 000 00	-
Gen.& Ref.Mtg.5% Gold Bds.Series"A".	9 327 500 00	9 327 500 00	-
The Chase Natl.Bk.of the City of N.Y.	3 500 000 00	3 500 000 00	-
Mississippi Valley Trust Co.	1 000 000 00	1 000 000 00	-
The Railroad Credit Corporation	-	503 955 33 -	503 955 33
Amounts payable to affiliated companies:			
Notes-RFC-Purchased by Sou.Pac.Co.	17 882 250 00	17 882 250 00	-
Open Accounts-Southwestern Transp.Co.	890 289 51	890 289 51	-
The S.W.Town Lot Corp.	20 444 97	19 162 79 +	1 282 18
Total long term debt	75 122 379 16	75 625 052 31 -	502 673 15
CURRENT LIABILITIES			
Audited accounts and wages payable	1 814 177 14	2 071 549 81 -	257 372 67
Miscellaneous accounts payable	258 322 37	230 856 21 +	27 466 16
Interest matured unpaid	1 173 203 15	1 186 056 31 -	12 853 16
Unmatured interest accrued	63 170 82	22 604 16 +	40 566 66
Accrued accounts payable	58 711 50	70 532 29 -	11 820 79
Taxes Accrued:			
State, county and city taxes	689 423 17	743 507 16 -	54 083 99
Federal income tax	6 021 755 77	20 197 217 28 -	14 175 461 51
Other federal taxes	126 848 24	123 942 93 +	2 905 31
Other current liabilities	249 730 76	188 168 52 +	61 562 24
Total current liabilities	10 455 342 92	24 834 434 67 -	14 379 091 75
DEFERRED LIABILITIES			
Interest in default:			
First Term.& Unify.Mtg.Bonds	134 383 33	134 383 33	-
Gen.&Ref.Mtg.5% Gold Bds.Series"A"	2 020 958 33	2 487 333 33 -	466 375 00
Cent.Ark.and East.RR.Co.1st Mtg.Bds.	265 202 93	265 202 93	-
S.W.& S.T.Ry.Co. First Mtg.Bonds	601 611 48	601 611 48	-
Reconstruction Finance Corporation	1 443 540 80	2 958 688 30 -	1 515 147 50
Others	225 130 41	635 607 06 -	410 476 65
Other deferred liabilities	199 620 04	193 791 34 +	5 828 70
Total deferred liabilities	4 890 447 32	7 276 617 77 -	2 386 170 45
UNADJUSTED CREDITS			
Other unadjusted credits	390 514 21	310 139 04 +	80 375 17
Accrued depreciation-Leased property	143 448 54	110 050 27 +	33 398 27
Total unadjusted credits	533 962 75	420 189 31 +	113 773 44
SURPLUS			
Earned surplus-Appropriated	-	4 898 148 73 -	4 898 148 73
Earned surplus-Unappropriated	35 354 529 79	28 718 776 48 +	6 635 753 31
Total surplus	35 354 529 79	33 616 925 21 +	1 737 604 58
GRAND TOTAL	162 436 361 94	178 852 919 27 -	15 416 557 33

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D. C. Form No. 30

United States of America
ss:
Eastern District of Missouri

I, James J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Comparative General Balance Sheet as of October 31, 1946 and 1945 Eliminating Inter-Company Items, filed December 11, 1946 with STATEMENTS OF ASSETS AND LIABILITIES OF THE DEBTORS AS OF OCTOBER 31, 1946, AND CONSOLIDATED STATEMENT OF REVENUES AND EXPENSES OF THE DEBTORS FOR THE MONTH OF OCTOBER, 1946, In the Matter of St. Louis Southwestern Railway Company, Debtor, In Proceedings For the Reorganization of a Railroad, No. 8497, and

CERTIFIED COPY

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at St. Louis, Missouri this 11th day of December, A. D. 1946

JAMES J. O'CONNOR
Clerk.

By Annie W. Kimbles
Deputy Clerk.

No. 8497

United States District Court

Eastern DISTRICT OF Missouri

In the Matter of
St. Louis Southwestern Railway
Company,
Debtor.

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APPENDIX C

—10429—

[Order No. 904]

In the

DISTRICT COURT OF THE UNITED STATES,

Eastern Division, Eastern Judicial District of Missouri.

In the Matter of	**In Proceedings for the**
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor.	**Reorganization of a Railroad. No. 8497.**

ORDER

Authorizing Trustee to Participate in Retirement of Texarkana Union Station Trust Certificates.

The petition of Berryman Henwood, Trustee of the property of the principal Debtor St. Louis Southwestern Railway Company, and of the Debtor St. Louis Southwestern Railway Company of Texas, for authority to participate with the other proprietary companies in calling and retiring Texarkana Union Station 5% Trust Certificates, due December 1, 1957, at a premium of 7½%, and at a cash outlay to the

Trust Estate of the Debtors in the amount of $346,500.00, being this day presented to the Court, and it appearing that the notice of the filing of said petition has been served upon the mortgage trustees of the Debtors and their counsel, and upon interveners herein, and upon other parties in interest who are on the mailing list of Trustee accustomed to receive printed copies of the orders entered in these proceedings, and all parties in interest having been heard or having been given an opportunity to be heard, and it appearing that the retirement of said Trust Certificates is in the best interest of the Trust Estate, and the Court being fully advised in the premises,

It Is Ordered:

That the said petition be and the same hereby is approved, and the Trustee is authorized and directed to participate with the other proprietary companies in calling and retiring on December 1, 1946, $1,500,000 par value of Texarkana Union Station 5% Trust Certificates, at an expense to the Trust Estate of the Debtors herein of $346,500.00, as more fully set out in Trustee's petition pursuant to which this order is entered, and the said Trustee is authorized and empowered to do all things requisite and necessary in the premises.

GEO. H. MOORE,
District Judge.

Dated September 13, 1946.

Filed Sept. 13, 1946. Jas. J. O'Connor, Clerk.

APPENDIX D

— 10471 —

[Order No. 909]

In the

DISTRICT COURT OF THE UNITED STATES,

Eastern Division, Eastern Judicial District of Missouri.

In the Matter of ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor.	In Proceedings for the Reorganization of a Railroad. No. 8497.

ORDER

Authorizing and Directing Trustee to Pay Claim of the Railroad Credit Corporation.

The petition of Berryman Henwood, Trustee of the property of the principal Debtor St. Louis Southwestern Railway Company, and of the other Debtors herein, for authority to pay the claim of The Railroad Credit Corporation, evidenced by note, being this day presented to the Court, and it appearing that notice of the presentation of said petition has been served upon the mortgage trustees of the Debtors

APPENDIX B

[Order No. 309]

In the

DISTRICT COURT OF THE UNITED STATES,

Eastern Division, Eastern Judicial District

of Missouri.

In Proceedings for the Reorganization of a Railroad No. 6897.

In the Matter of

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Debtor.

ORDER

Authorizing and Directing Trustee to Pay Claim of the Railroad Credit Corporation.

The petition of Berryman Henwood, Trustee of the property of the debtor St. Louis Southwestern Railway Company, and of the other Debtors herein, for authority to pay the claim of The Railroad Credit Corporation, evidenced by note, being this day presented to the Court, and it appearing that notice of the filing of said petition has been served upon the mortgage trustees of the Debtors and their counsel, and upon intervenors

and their counsel, and upon interveners herein, and upon other parties in interest who are on the mailing list of the Trustee accustomed to receive printed copies of the orders entered in these proceedings, which notice the Court finds sufficient, and all parties in interest having been heard or having been given an opportunity to be heard, and the Court being fully advised in the premises, finds:

1. That as of July 31, 1946, the Debtor herein was indebted to The Railroad Credit Corporation in the principal amount of $382,249.06; that interest thereon has been paid to July 31, 1946, said amount representing the principal unpaid balance remaining due on account of certain advances made to the Debtor by The Railroad Credit Corporation and evidenced by principal Debtor's promissory note of April 1, 1934, in the face amount of $1,367,875.00, said indebtedness having been reduced from time to time by cash payments and payments of amounts credited to the Debtor as its distributive shares under the Marshalling and Distributing Plan, 1931, whereby The Railroad Credit Corporation received various sums from the railroads of the country and loaned therefrom amounts needed by certain railroads to meet their fixed interest charges, said amounts when repaid being distributed to those railroads which provided the funds and in the proportions so provided by them.

2. That as collateral security for the indebtedness of the Debtor herein, The Railroad Credit Corporation holds certain obligations of the Debtor and its subsidiaries, to-wit: Valley Terminal Railway Com-

— 10172 —

pany Common Stock of a par value of $5,000.00; Valley Terminal Railway Company Bills Receivable of a face value of $840,431.64; The Southwestern Town Lot Corporation Common Stock of a par value of $100,000.00; The Southwestern Town Lot Corporation Advances of a face value of $846,843.45; Southwestern Transportation Company Capital Stock of no par value but with a book value of $1,481,100.00; Arkansas & Memphis Railway Bridge & Terminal Company Preferred Stock of a par value of $550,000.00; Southwestern Greyhound Lines, Inc., Class B Common Stock, of no par value but with a book value of $160,000.00.

3. That in the Plan of Reorganization proposed by the Interstate Commerce Commission in its Report and Order of June 30, 1941, and in its Supplemental Report and Order dated March 9, 1942, and in the opinion of this Court and order thereon approving said Plan of Reorganization under date of February 9, 1944, confirmed by the Circuit Court of Appeals in opinion dated August 26, 1946, the claim of The Railroad Credit Corporation has been consistently recognized as fully secured and entitled to payment.

4. That payment in full of this claim at this time will not materially affect or modify the aforesaid Plan of Reorganization and will not in any way hinder or impede the reorganization of the Debtor, but on the contrary will facilitate the same through the removal of a secured creditor, and the necessity for the making of a provision for the payment of this claim, as well as a saving to Debtors' Estate of the further accrual of interest.

—10474—

Wherefore, it is hereby ordered:

That the said petition be and the same hereby is approved, and the Trustee is ordered and directed to pay in cash to said The Railroad Credit Corporation the amount due and unpaid on the promissory note of the principal Debtor dated April 1, 1934, together with accrued and unpaid interest thereon to date of payment upon delivery to said Trustee by said The Railroad Credit Corporation of the cancelled promissory note of St. Louis Southwestern Railway Company, Debtor, dated April 1, 1934, in the principal amount of $1,367,875.00, the pledge of said principal Debtor's distributive shares in the Marshalling and Distributing Plan, 1931, and the surrender to the Trustee of all of the collateral security, consisting of certain obligations of the Debtor and its subsidiaries as particularly set out in paragraph 2 herein, and the Court hereby expressly reserves jurisdiction to make such further order or orders as may be deemed necessary in the premises.

GEO. H. MOORE,
District Judge.

Dated September 25th, 1946.

Filed Sept. 25, 1946. Jas. J. O'Connor, Clerk.

APPENDIX E

5613

[MEMORANDUM OPINION AND ORDER No. 420.]
(FILED AND ENTERED JUNE 28, 1946.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

In the Matter of
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor.
No. 53209.

MEMORANDUM OPINION.

Confirmation is sought by these proceedings of the Plan of Reorganization for the Debtors, as modified and approved by the Interstate Commerce Commission, hereinafter called the "Commission", in its Supplemental Report and Order of May 1, 1944.

Certification has been made heretofore to this Court by the Commission of the results of the submission to the various classes of creditors entitled to vote on the Plan. An approval of the plan in excess of a two-thirds majority was expressed by each class of creditors, save two; the Convertible Debenture bondholders whose vote for approval was slightly in excess of 24% and the Little Rock and Hot Springs Western Bondholders whose vote for approval amounted to 19%.

Subsection (e) of Section 77 of the Bankruptcy Act makes

it mandatory upon the Court to confirm the Plan if more than two-thirds of all classes of creditors concerned so vote. Said subsection likewise "provides that, if the plan has been rejected, 'the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)'."

Said clause (1) of the first paragraph of subsection (e) provides that the Court may approve a plan if satisfied that it is "fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors and stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

Subsection (e) further provides that if the Judge shall not confirm the Plan he shall file an opinion with a statement of his conclusions and his reasons therefor and enter an order in which he shall either dismiss the proceedings, or in his discretion and on the motion of any party in interest refer the case back to the Commission for further proceedings, including the consideration of modifications of the Plan or the proposal of new plans.

Before proceeding further the Court wishes to divert for a moment and point out what has transpired in the interval following the approval of the Plan on June 15, 1945 by this Court, and the present.

An ever growing wave of criticism directed against the Commission and the District Courts for the drastic reduc-

tions in capitalization effected by their plans of reorganization finally culminated in Congress giving extensive study to proposed remedies.

Exhaustive hearings were held by committees of both Houses of Congress and in the hearings before the Committee on Interstate Commerce of the Senate, during February and March of this year, many new ideas were advanced regarding the subject of railroad reorganization culminating in the passage of Senate Bill 1253 on June 15, 1946—which bill now awaits House consideration.

Apropos of the widespread dissatisfaction with these reorganizations let me quote from the printed record of the hearings which were held in connection with Senate Bill 1253.

Senator Wheeler, Chairman of the Committee, stated in the printed record (p. 516):

"If you had not had these changed conditions (the improvement of railroad finances during the war years) there would not have been this complaint we have from all the country, from stockholders and bondholders and everybody else. I just don't believe that the Commission ought to hesitate at all to say that in view of the changed conditions there ought to be some changes."

To which Commissioner Mahaffie of the Interstate Commerce Commission agreed by saying:

"Well, I think that there should * * * be no hesitancy at all."

And the Senator goes on (p. 412):

"The reason we have tried to work out something in this committee is because of the terrific pressure that has been put on the committee and the Congress by Members of the Senate and their own constituents to pass the Hobbs bill. We have tried to work out something not as drastic as the Hobbs bill."

It must be remembered, in fairness, that practically all of the major plans of reorganization were worked out by the Commission in the year 1940 or prior thereto. Hence they do not and cannot reflect the extensive strengthening of cash resources, the important retirement of debt, and the very considerable improvements to road and equipment made possible by the huge revenues received during the ensuing war years.

It must be remembered further, that since the Milwaukee and Western Pacific decisions of the U. S. Supreme Court, undoubtedly most District Courts throughout the land, and certainly this Court, have been firmly convinced of their legal incapacity to pass upon matters of valuation or allocation of securities as set out in plans of reorganization certified to them by the Commission.

Likewise, the Commission sensing the need for changes as the war years went on were undoubtedly loath to ask the District Courts for the return of their plans, feeling that they had passed out of their jurisdiction unless returned to them by the Courts. In proof of this may this Court again advert to the Senate hearings mentioned before.

In his testimony Commissioner Mahaffie states (p. 515):

"The Commission has considered that after a plan has been certified by it to the court having jurisdiction, the question of whether conditions had so changed as to require its resubmission with a view to possible revision is one for the court. And that the Court's determination is wholly a matter of judicial discretion. Consequently the Commission has felt that it should not volunteer advice to the courts in that regard."

To this Chairman Wheeler replied (p. 515):

"While I can readily appreciate that the Commission might hesitate somewhat to ask the Court to return a plan some courts might possibly resent it, nevertheless I think I

would have taken a chance on it if I had been in the position of the Commission.

"On the other hand you may have had a situation where the courts were reluctant to send a plan back to the Commission. * * * In the meantime some of these securities were wiped out of existence. I just don't believe that the Commission on the one hand or the courts on the other hand, when an injustice is being done, should stand upon the question of mere fear that they are perhaps going to offend each other."

Only a few days ago when Senate Bill 1253 was under debate Senator Wheeler stated:

"Let us consider the matter from the social standpoint. If we have another depression in this country we are bound to be faced with the same grave social problems. What do Senators believe the people of the country will think of Government agencies which permit the wiping out of $2,500,000,000 worth of railroad stock, a considerable portion of which was owned by working men and women, by widows and orphans, while at the same time bonds which had been selling as low as $2.50 rose to par or over, by reason of the fact that the guess made by the Interstate Commerce Commission resulted in wiping out the stocks? What are those who lost by reason of that guess going to think of that Government agency?

"Time and again on the floor of the Senate I have defended the Interstate Commerce Commission, but I say that the Commission should have said to the courts:

"'We are going to call back the plans affecting these railroads now in receivership, revamp them, make them conform to the facts and realities, and try to have the railroads operated for the benefit of those who own the roads.'

"But they did not do that. The result is that those who held the senior securities which they bought in some cases

at as low as $2.50 now have bonds worth up to $80 or $90 or even $100."

Congressional Record—Senate, June 15th, 1946 (p. 7114).

I am in accord with the sentiments of Senator Wheeler. We must be realistic. In the face of possible injustice no one should stand on ceremony.

In the present case we have a plan that except for slight modifications was prepared by the Commission in 1940 and rests on studies of earnings, etc., going back to 1937 and even beyond.

Against that we find the Debtor today with cash, or equivalent of over $70,000,000.; with an R.F.C. loan aggregating, principal and interest, in excess of $18,000,000.00, paid in full; with the entire first mortgage of the Peoria Terminal Co., to all intents and purposes paid in full; with over 20% of the Choctaw & Memphis first mortgage retired; and with an amazing reduction, in the interim, of equipment debt. Three classes of creditors set up in the original Plan have disappeared—the banks, the R.F.C., and the Peoria Railway Terminal Co.

The above recital does not take into account the tremendous sums expended over the period on improvement of road and equipment, nor does it include the retirement of debt on jointly owned facilities such as the Joliet and Denver terminals.

Certain it is that if Congress and the Commission now feel that reorganization plans prepared prior to the war did not properly evaluate the financial benefits flowing from the revenues of the war years, then this present case merits further review and consideration.

The various bills presented in, and hearings held by Congress open up a new vista of hope for the junior creditors and stockholders of the bankrupt railroad corporations.

However, in holding out hope to the junior creditors and

stockholders, this court, above all, would not have that hope illusory. The Commission cannot throw to the winds all consideration of future earnings, nor can it perform miracles. The war revenues are past, higher costs of labor and materials, and many other new problems beset railroad management. With the most optimistic approach by the Commission it would be vain for the junior creditors to expect to be made whole.

It would seem, with the sound background that exists, this Court's trustees, by making use of available cash, together with the proceeds of a conservative loan to be approved by the Commission and this Court, should be able to pay, at equitable prices, the General Mortgage and all of the relatively small divisional first mortgages.

This would achieve for the First and Refunding Mortgage, the Secured Bondholders, and all junior security holders a greater strengthening of their position and a chance for all to share to a larger degree in the securities of the reorganized company. Such a program would be in line with the debt retirement by trustees so strongly urged by the Chairman of the Senate Committee and would have the undoubted cooperation of the Commission.

Accordingly, in view of the dissenting vote of two classes of creditors, and in further view of what has been here said, the plan is not confirmed.

ENTER:

MICHAEL L. IGOE,
United States District Judge.

Appendix F

SECTION 77 (e) OF THE BANKRUPTCY ACT (11 U.S.C. 205 (e)) PROVIDES AS FOLLOWS:

Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearings, are reasonable, are within such maximum limits as are fixed by the Commis-

sion, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of sub-section (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summariza-

tion thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed

to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further,* That if, in any reorganization proceed-

ing under this section the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commis-

sion shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 879, 909 & 936

No. 879

SOUTHERN PACIFIC COMPANY,
a railroad corporation, Intervener,
Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
Respondents.

No. 909

WALTER E. MEYER, Intervener,
Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
Respondents.

No. 936

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation, Debtor,
Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
Respondents.

BRIEF OF PROTECTIVE COMMITTEE FOR HOLDERS OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY FIRST TERMINAL AND UNIFYING MORTGAGE BONDS, INTERVENER, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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The Daily Record Co., Baltimore 3, Md.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals herein (R. 5559-5680) is reported at 157 F. (2d) 337. The opinion of

the District Court (R. 5183-5212) is reported at 53 F. Supp. 914. The initial Report of the Interstate Commerce Commission (R. 3495-3735) is reported at 249 I. C. C. 5, and its Supplemental Report (R. 3736-3820) at 252 I. C. C. 325.

STATUTES INVOLVED.

Because of their length, Sections 77(d), (e) and (g) of the Bankruptcy Act (11 U. S. C. sec. 205(d), (e) and (g)) are printed as Appendix A to this brief.

SUMMARY OF ARGUMENT.

I. The contentions of Walter E. Meyer contained in Points I, II and III of his brief, were fully considered and properly decided by the Interstate Commerce Commission, by the District Court and by the Circuit Court of Appeals, and there is, therefore, no reason for this Court to exercise its discretion to review.

II. It was within the discretion of Judge Moore to deny the motion of Walter E. Meyer for new hearings, and such discretion was properly exercised.

III. The question *vel non* the debtor is now solvent, is irrelevant and immaterial in this reorganization.

IV. The so-called "changed conditions" were in the contemplation of the Interstate Commerce Commission at the time it formulated the plan of reorganization.

ARGUMENT.

POINT I.

The contentions of Walter E. Meyer contained in Points I, II and III of his brief, were fully considered and properly decided by the Interstate Commerce Commission, by the District Court and by the Circuit Court of Appeals, and there is, therefore, no reason for this Court to exercise its discretion to review.

In *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, (1943) 318 U. S. 523, 545, this Court said:

> "Elimination of delay in railroad receivership and foreclosure proceedings was one of the purposes of the enactment of §77. Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific R. Co., 294 U. S. 648, 685. Section 77(g) giving the District Court power to dismiss the proceedings for 'undue delay in a reasonably expeditious reorganization' was inserted in recognition of 'the necessity of prompt action'. (H. Rep. No. 1283, 74th Cong. 1st Sess. p. 3) We cannot conclude that in this proceeding which already has been pending seven years and which was before the Commission for over four years, the interests of junior claimants have been sacrificed for speed."

These proceedings were first instituted on December 12, 1935 (R. 24-32). Sixteen months later, by April 24, 1937, all plans of reorganization had been filed and hearings completed before the Interstate Commerce Commission (R. 3497). This initial expedition ended with those hearings when the delaying activities of Mr. Meyer started. Those activities were succinctly set forth on pages 9 to 16 inclusive of the "Brief of Southern Pacific Company, in Reply to Brief of Appellant Walter E. Meyer, in Reply to Motion for Stay or Remand by Appellant Walter E. Meyer,

and in Respect of Amicus Brief of the United States" dated March 19, 1945, and filed with the United States Circuit Court of Appeals for the Eighth Circuit. Rather than paraphrase that concise historical statement, it is quoted here in full:

> "As to the proceedings before the Commission: On December 7, 1936, within the time allowed therefor, the Debtor filed a plan of reorganization with the Commission, and other plans were filed by other parties (R. 3496). Hearings upon the plan of reorganization were held on March 16, 1937, were recessed, and were concluded on April 24, 1937 (R. 3497). At these hearings, the Appellant Meyer presented various contentions and charges against Southern Pacific Company, which were summarized and disallowed in the proposed report of Examiner J. V. Walsh, filed February 7, 1938 (R. 255, 306-314). The case was argued upon exceptions to the proposed report on May 16, 1938 (R. 3496). A petition was filed in April, 1937, by Appellant Meyer for an investigation by the Commission and for such other relief as might seem meet in respect of his charges against Southern Pacific Company and others (R. 339 to 351). This was amplified by a supplemental petition filed in June, 1937 (R. 357 to 467), in which the prayer requested, in addition to an investigation, an opportunity for the petitioner to introduce evidence at reopened hearings. The Commission on January 25, (*sic*) 1939, entered an order reciting the petition by Appellant Meyer and directing that the proceeding be reopened, 'with respect to the matters alleged in said petitions, in so far as they may be relevant and material in this proceeding' (R. 501). A hearing pursuant to this order was held from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 3549). At these hearings, Meyer presented his case relative to his charges against Southern Pacific Company and others, and his adversaries presented testimony on their part. The hearings were conducted by Commissioner Clyde B. Aitchi-

son and Examiner Walsh. On June 30, 1941, the Commission issued its report, one Commissioner dissenting on this phase, in which it generally and specifically found against each and every contention of the Appellant Meyer (R. 3547 to 3678). A petition for modification was filed by the Appellant Meyer, along with petitions by others for modification of other phases of the report, and the Commission on March 9, 1942, issued its supplemental report maintaining and elaborating upon its findings against Meyer's contentions (R. 3742 to 3752).

"As to the proceedings in the Court below: We have referred to the pleas by Appellant Meyer and others in opposition to the petition for reorganization and the findings of December 31, 1935, made by the Honorable Charles B. Davis sitting in the Court below, overruling his contentions (R. 87 to 93). In accordance with Title 11, U. S. C. A., §205(c)(7), directing that the judge shall promptly determine and fix the time within which claims may be filed and the manner in which they may be evidenced and allowed, the Court by its Order No. 28, dated February 5, 1936 (R. 3953 to 3955), and by its Order No. 81, dated May 22, 1936 (R. 3955 to 3961), fixed times and procedures in respect of the filing of claims. By its Order No. 184, dated April 13, 1937, it provided an extended time for the filing of protests and objections to allowances of any claims which had been filed. This Order read (R. 3962):

> "'1. That the time within which parties in interest may file protests or objections to the allowance of any claims for which proofs of claim have been filed herein, be and it hereby is extended (a) as to proofs of claim of mortgage trustees or others filed under the provisions of Order No. 81, to and including May 15, 1937, and (b) as to all other proofs of claim, to and including July 15, 1937.'

By its Order No. 272, dated February 25, 1938 (R. 3962 to 3965), it referred the determination of claims to the Honorable Marion C. Early, Special Master. Pursuant

to these orders, the Reconstruction Finance Corporation, on March 18, 1936, filed its claim in respect of the indebtedness of the St. Louis Southwestern Railway Company to it on account of note for the principal sum of $17,882,250 and for interest thereon (R. 3965 to 3975). Upon the payment by the Southern Pacific Company of this note, guaranteed as to collection by it, the Reconstruction Finance Corporation assigned the note and claim to Southern Pacific Company, which assignment was filed with the Court July 21, 1936 (R. 3975 to 3981). Within the time allowed therefor, two corporations, Anglo-Continentale Treuhand, A. G., and Mondiale Handels-und Verwaltungs, A. G., filed protests to the assigned claim held by Southern Pacific Company (R. 3982 to 3984). After extended hearings, the Master, Marion C. Early, filed with the Court on August 25, 1939, his findings of fact and conclusions of law (R. 3985 to 3995). His findings include the following (R. 3991):

> " 'The St. Louis Southwestern Railway Company was operated as a separate and distinct corporation, and its accounts and affairs were not commingled in any way with those of Southern Pacific Company, and its officers, including that of President, devoted their entire time to its affairs, while Messrs. Holden and McDonald, who also held positions with Southern Pacific Company, devoted only a portion of their time to the affairs of the St. Louis Southwestern Railway Company. Southern Pacific Company made no loans or advancements to St. Louis Southwestern Railway Company, but its Board of Directors adopted a resolution in January, 1935, to advance it loans on open account not to exceed in the aggregate $100,000.00. No advancements or loans were made, however, under authority of this resolution.
>
> " 'Claimant, the Southern Pacific Company, and St. Louis Southwestern Railway Company were at all times conducted as independent corporations, kept separate books, and the funds of the

two companies were never commingled, and I find that Claimant did not overreach, coerce or take any advantage of Debtor, St. Louis Southwestern Railway Company, by reason of the fact that it owned approximately 87 per cent of its capital stock.'

The Master recommended that the claim be allowed (R. 3994). Exceptions were taken to the report of the Special Master by the protestant corporations (R. 3996), and the Court, upon submission of the matter to it, on January 26, 1940, held that the report of the Special Master should be sustained, the protests disallowed, and the claim of Southern Pacific Company allowed (R. 4002, 4003). No appeal was taken to this Court from this order by any party to these proceedings. On March 23, 1942, the Commission, as provided by Title 11, U. S. C. A., §205(e), certified the plan of reorganization, as modified by its supplemental report, to the Court below (R. 3494). On May 29, 1942, appellant Walter E. Meyer, among others, filed objections in the Court to the plan of reorganization (R. 3840). These objections contained various charges against the Southern Pacific Company and requested, among other things, that the interest of Southern Pacific Company as a creditor and stockholder be expunged or at least subordinated to all other creditors and stockholders of the Debtor (R. 3842). On June 9, 1942, Meyer was permitted to intervene as a party to the proceedings in the Court below (R. 4006). After the overruling on July 13, 1942, of a motion by the appellant Meyer to take further testimony and obtain further documentary evidence, for the reason that his motion tended to unduly enlarge the subject matter of the inquiry and was calculated to retard and prolong the consideration of the plan of reorganization (R. 4007), the plan of reorganization and the various objections thereto came on for hearing on October 26, 1942 (R. 4051). A great deal of testimony was introduced, principally by the appellant Meyer. The hearing, which

was before Judge Davis, was concluded on November 5, 1942 (R. 4993), with provision for additional arguments to be made at a later date for appellant Meyer and the Debtor, and for the filing of briefs by all the parties. Subsequently, before these arguments were made and briefs filed, Judge Davis died, and Judge Moore called the parties for a conference on April 23, 1943, to ascertain their views as to further procedure (R. 5137). All the parties interested except Meyer urged Judge Moore to consider the case upon the record as certified to the Court by the Commission and upon the evidence as taken by Judge Davis. Appellant Meyer took the position that there should be a new trial before Judge Moore (R. 5170, 5179), although he did not object to the Court considering the testimony which had been taken, provided that he could introduce new testimony (R. 5170, 5180). After the conference the Court entered an order (R. 5181-5183) taking the case as submitted on the record as made before the Commission and on the testimony as taken before Judge Davis, with provision for oral argument on May 31, 1943, and for briefs. There was a provision in the order that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182). In accordance with this order, all of the parties so desiring argued the case before Judge Moore and filed briefs. Appellant Meyer argued orally and filed briefs with Judge Moore but filed no motion for the taking of additional testimony or otherwise as to the completion of the record. On February 9, 1944, Judge Moore rendered his opinion and order approving the plan of reorganization and overruling all of the objections thereto, including those of the appellant Meyer (R. 5183 to 5213). On March 9, 1944, Meyer filed his notice of appeal to this Court from this judgment (R. 4).

"This Court should also have before it an outline of the Appellant Meyer's connection with the Debtor.

"Mr. Meyer, a member of the Bar of the State of New York since 1903 (R. 1350), made an investment in St. Louis Southwestern Railway Company stock as early as 1920 (R. 530). Thereafter he dealt heavily and extensively in St. Louis Southwestern Railway Company stock, buying and selling, but on the balance being a purchaser (Meyer's Exhibit No. 262 before the Commission, R. 1049), so that his total investment became $964,319.20 (R. 531). He was also an active investor in other properties and had other business interests (R. 1350 to 1351). However, a large share of his time was given over to the St. Louis Southwestern (R. 1351). He intervened as a party, in opposition to the management of the St. Louis Southwestern Railway Company, in many proceedings before the Commission (R. 533). He continuously objected to the conduct of the Railway Company's affairs by the management and circularized at times the stockholders of the St. Louis Southwestern Railway Company. These activities were initiated as early as 1925 and long before the Southern Pacific Company had any relationship with the St. Louis Southwestern Railway Company, other than as a connecting carrier. Examples of these activities, prior to Southern Pacific Company acquisition of stock of the St. Louis Southwestern Railway Company, appear in the record (R. 539, 540, 577, 689). There also appear in the record examples of the observations of prior managements of the St. Louis Southwestern concerning Meyer (R. 699, 712, 716). After Southern Pacific Company acquired the stock of the St. Louis Southwestern Railway Company, these activities continued, but were directed at Southern Pacific Company. Charges against it were circularized among St. Louis Southwestern security holders (R. 835, 838). Not content with this, attacks on Southern Pacific officers who had displeased him, were distributed by Meyer among Southern Pacific stockholders (R. 1032, 1042). These were appropriately answered (R. 1040). The Commission quoted the views of the Debtor's officers of Meyer's conduct in its report (R.

3612, 3613) and reaffirmed its findings in its supplemental report, despite his request that they be stricken (R. 3752). While Meyer was making and publicizing his attacks upon the St. Louis Southwestern management, he was increasing his stockholdings by purchases in the market (R. 634, 1467-1469; *Cf.* R. 1049). Many railroads in the Western territory, national banking houses, and others, were brought within the range of the appellant's attacks. Some ninety-odd persons were defendants in a stockholder's derivative action brought by Walter E. Meyer to recover $30,000,000 in 1934 (R. 1011). The suit was dismissed upon jurisdictional grounds, *Meyer, et al.* v. *Kansas City Southern, et al.*, 11 F. Supp. 937, affirmed (C. C. A. 2d) 84 F. (2d) 411, certiorari denied 299 U. S. 607. Claims of persecution were made against Mr. Henry W. de Forest, a Southern Pacific Company director and officer, although the appellant's contact with him had been slight (R. 1405 to 1415). Of this the Commission says (R. 3566):

> " 'Meyer, in support of his charge that the filing of the petition for reorganization was directed by de Forest as an act of resentment and with a fixed determination to destroy the debtor, points to no suggested basis therefor except de Forest's advanced age, and except that he suggests that he may have been instrumental in forcing de Forest's resignation as chairman of the Southern Pacific Company. Testifying at the hearing, April 24, 1937, [R. 173 to 216] in response to Meyer's subpoena, de Forest gave no indication of any resentment or malice toward Meyer; and stated that his resignation was voluntary, and due to his age. At the time of the further hearing, de Forest was deceased. The charge is without foundation, so far as the record shows.'

With the passage of time, the range of attack expanded. Several years ago it came to include the Illinois Central Railroad Company and the Union Pacific Railroad Company which were alleged to dominate the South-

ern Pacific Company, upon grounds tenuous and fantastic (R. 3021 to 3038, 4832 to 4865). Although such charges do not merit serious consideration, it may be noted that the Commission with its usual meticulousness found them unfounded (R. 3551). The Trustee of the Debtor, Berryman Henwood, appointed by the Honorable Charles B. Davis in the Court below, in accordance with the direction of the Court (R. 3902) and the mandate of the statute, Title 11, U. S. C. A., §205(c)(9), rendered reports as to whether or not there were irregularities, fraud, misconduct or mismanagement of the Debtor's affairs. These reports are in the record (R. 3903 to 3951). Because the Trustee did not find as a result of his investigations any facts indicating to him the existence of irregularities, fraud, misconduct or mismanagement, e.g., R. 3950, Appellant Meyer accuses the Trustee of submitting to Southern Pacific Company control (p. 217, his brief), and of being perfunctory in the performance of his duties (R. 1664, 1665) (p. 271, his brief). The Appellant Meyer's brief herein dated February 14, 1945, his motion that appeal be stayed or proceedings remanded dated November 18, 1944, and his accusations directed against parties and counsel in the oral hearings heretofore held in Court, are further developments. The Commission, which had extensive opportunity to observe and study the Appellant Meyer in the hearings before it, made its findings in its report as to the purpose or motive for these activities, as follows (R. 3674):

> " 'Meyer had been made an offer for his stock in the debtor, which we had found sufficient in the Control case, *supra;* and his apparent animating purpose has been to obtain from the Southern Pacific a consideration for his stock in excess of that offer.'

This finding it reaffirmed in its supplemental report (R. 3752)."

Further evidence of the full opportunity afforded Mr. Meyer to present his contentions, and of the full consideration given thereto by the Interstate Commerce Commission, by the District Court and by the Circuit Court of Appeals, is found in their reports and opinions. In the initial report of the Interstate Commerce Commission (*St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, R. 3495-3713), out of the total of 219 pages, 131 pages (R. 3547-3678), or almost 60 per centum of the entire report was devoted to a detailed analysis and consideration of Mr. Meyer's charges. Further, Commissioner Eastman wrote a dissenting report of 19 pages (R. 3713-3732) devoted wholly to Mr. Meyer, but the Commissioner's dissent was based on a desire to reopen the hearings to explore the suggested unification of the Debtor with Southern Pacific Railroad Company (R. 3731-3732) and not on Mr. Meyer's charges. In his dissent he characterized Mr. Meyer's activities in this sentence (R. 3724):

> "Brooding over this succession of events, I think that Meyer has conjured up conspiracies which go beyond the reasonable probabilities of the situation."

In the opinion of the District Court (R. 5183-5212), of the 29 pages of the opinion, 7 (R. 5197-5203) were devoted to Mr. Meyer's claims, or 24 per centum of the total. In the opinion of the Circuit Court of Appeals (R. 5563-5680), 83 pages (R. 5569-5652) out of the total of 117 pages of text, contain detailed consideration of Mr. Meyer's charges, or 70 per centum of the entire opinion.

It thus appears that Mr. Meyer's contentions have been fully presented to and considered by the various tribunals to which he has submitted them. Mr. Meyer, in his Petition for Writ of Certiorari and supporting brief has failed to show any special and important reason to justify this

Court in exercising its discretion to grant the writ. Since this proceeding has been pending more than twelve years and was before the Interstate Commerce Commission for over five years, it does not seem that the interests of the stockholders have been sacrificed by any failure to consider any and all matters presented.

Point II.

It was within the discretion of Judge Moore to deny the motion of Walter E. Meyer for new hearings, and such discretion was properly exercised.

In substance, what Mr. Meyer sought was an opportunity again to present his case before a new judge, or a new trial. That a successor judge has the power to pass upon a motion for a new trial, has long been upheld in this Court. In *Re The Life and Fire Insurance Company of New York v. The Heirs of Wilson*, 8 Pet. 291, 303 (1833), this Court said:

> "In this case, the district judge seems to think that as the judgment was not rendered by him, he has no power to grant a new trial, as he is not acquainted with the facts and circumstances which should influence his discretion in making such an order; and that, consequently, he is not bound to sanction the judgment by his signature. * * *
>
> "But the district judge is mistaken in supposing that no one but the judge who renders the judgment can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties."

It seems clear, therefore, that Judge Moore had the power to pass upon, and therefore, to refuse, Mr. Meyer's motion for a new trial.

In that event, it is necessary to examine into the question of whether Judge Moore abused his discretion in so exercising that power. The Bankruptcy Act provides (11 U. S. C. §205(d)):

> "The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan."

The only statutory reference to additional evidence before the court is an indirect one in subdivision (e), (11 U. S. C. §205(e)):

> "If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received."

In *Ecker v. Western Pacific Railroad Corporation*, 318 U. S. 448 (1943), this Court clearly set forth its views that the determination of the plan was, in the first instance, for the Commission, and that the court had only a limited review. This was reaffirmed in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 318 U. S. 523 (1943) and in *Reconstruction Finance Corporation v. Denver & Rio Grande Western Railroad Company*, ... U. S. ..... (June 10, 1946) (90 L. ed. 1134).

It thus appears that under the statute, as interpreted and applied by this Court, the District Court is to act upon the record before the Interstate Commerce Commission. The District Court, however, in its discretion, may receive addi-

tional evidence. In the *Western Pacific* Case, this Court said (1. c. 477):

> "Thus, while judicial review does not involve an independent examination into valuation, it does require that the court shall be satisfied, upon the record before the Commission, with such additional evidence as may be pertinent to the objections to the Commission's finding of value, that the statutory requirements have been followed."

And in the *Milwaukee* Case (1. c. 542):

> "As we have indicated in the Western Pacific Railroad Corporation Case, the power of the District Court to receive additional evidence may aid it in determining whether changed circumstances require that the plan be referred back to the Commission for reconsideration."

To recapitulate, the District Court is to pass upon the plan upon the record before the Interstate Commerce Commission with such additional evidence, if any, as the court may see fit to receive. Therefore, as to the record before the Commission, Judge Moore was in the same position as Judge Davis. The only ground for error, therefore, would be Judge Moore's action in considering the record made before Judge Davis.

It would appear to be patently absurd to further delay this reorganization where a part of the record was made before an administrative body and a part before another judge of the same court, because such latter part was not made before the judge who acted. This absurdity is emphasized by the further facts that undoubtedly the judge could have had the testimony taken before a master, that the Judge who acted heard arguments by all interested parties, and that he expressed himself as willing to receive motions "respecting the taking of additional testimony or otherwise pertaining to the completion of the record on

said Plan" (R. 5182), but no one, not even Mr. Meyer, made any such motion.

If Judge Moore had disregarded the testimony introduced before Judge Davis, Judge Moore would have complied strictly with the statute, and since no motion had been made to him respecting additional testimony, he could not be said to have abused his discretion by refusing to receive further testimony. Nor can he be held to have abused his discretion by acting on one transcript (from the Interstate Commerce Commission) and refusing to reject another (before Judge Davis), particularly when the witnesses in the different hearings were substantially the same, and most of the evidence before Judge Davis was documentary.

POINT III.

The question vel non the debtor is now solvent, is irrelevant and immaterial in this reorganization.

The three petitioners before this Court urge that subsequent to the Supplemental Report of the Interstate Commerce Commission (R. 3736), the assets of the debtor exceed its liabilities, i. e., that the debtor is "solvent" in the bankruptcy sense, and, therefore, that any plan which deprives the stockholders of the equity resulting from this "solvency" is an unfair plan which cannot be confirmed. This contention is based on a fundamental misconception of the purposes and provisions of the Bankruptcy Act (11 U. S. C. §205).

No part of these proceedings has been based upon any question of solvency in the bankruptcy sense. The original petition of the debtor only alleged "that it is unable to meet its debts as they mature" (R. 26). The Interstate Commerce Commission has made no finding that the debtor was insolvent, instead, its finding (R. 3700) was that stockholders could not participate in the reorganized com-

pany because their equities "have no value". The District Court, in its opinion approving the plan, made no specific finding relating to the debtor's solvency, but after discussing the matter, said "the Court is satisfied * * * that the findings made by the Commission * * * including its findings as to debtor's prospective earning power, the valuation and capitalization permissible for the purposes of this reorganization are supported by the entire record, * * *." (R. 5211-5212).

This procedure is within the clear intent of the statute that the permissible capitalization of the reorganized Company in railroad reorganizations is based primarily upon earning power. Section 77(e) provides (11 U. S. C. §205 (e)):

> "*Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, * * *."

The last clause, above quoted, has no meaning if it were to be construed as a mere repetition of the preceding clause as to insolvency.

The finding that an equity has no value is based upon earning power. This Court has so interpreted the act in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, supra*, 1. c. 540-541, as follows:

> "We recently stated in *Consolidated Rock Products Co. v. DuBois, * * * supra*, in connection with a reorganization of an industrial company, that the 'criterion of earning capacity is the essential one if the industry is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable.' p. 526. That is equally applicable to a rail-

road reorganization. * * * The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn. Earning power was the primary test in former railroad reorganizations under equity receivership proceedings. *Temmer v. Denver Tramway Co.*, (CCA 8th) 18 F. 2d. 226, 229; *New York Trust Co. v. Continental & C. Trust & Sav. Bank*, (CCA 8th) 26 F. 2d. 872, 874. The reasons why it is the appropriate test are apparent. A basic requirement of any reorganization is the determination of a capitalization which makes it possible not only to respect the priorities of the various classes of claimants but also to give the new company a reasonable prospect for survival. See Commissioner Eastman dissenting, Chicago, M. & St. P. Reorganization, 131 I. C. C. 673, 705. Only 'meticulous regard for earning capacity' (*Consolidated Rock Products Co. v. DuBois, supra*, p. 525) can afford the old security holders protection against a dilution of their priorities and can give the new company some safeguards against the scourge of overcapitalization . Disregard of that method of valuation can only bring, as stated by Judge Evans for the court below, 'a harvest of barren regrets'. 124 F. 2d. p. 765. Certainly there is no constitutional reason why earning power may not be utilized as the criterion for determining value for reorganization purposes. And it is our view that Congress when it passed Section 77 made earning power the primary criterion. The limited extent to which Section 77(e) provides that reproduction cost, original cost, and actual investment may be considered indicates that (apart from doubts concerning constitutional power to disregard them) such other valuations were not deemed relevant under Section 77 any more than under Section 77 B 'except as they may indirectly bear on earning capacity'. *Consolidated Rock Products Co. v. DuBois, supra*, p. 526."

If, therefore, earning power is the criterion, it is certainly conceivable that there might be situations where a highly solvent company produced only small returns, and

could only produce such small returns. In such instances, the application of the correct criterion of earnings might wipe out a value which would be obtainable by the equity owners on a liquidation if the assets were saleable at or near their book values. Such result would be necessary if the business was to be continued at all. The reverse situation, where a liquidation would produce nothing for the equity owners but where there were foreseeable earnings allocable to such equity, has been considered by this Court, and the equity holders allotted participation in the reorganized company. See *Otis & Co. v. Securities & Exchange Commission*, 323 U. S. 624 (1945).

As pointed out above, the base on which these proceedings were instituted and conducted, was that the debtor was unable to meet its debts as they mature. Despite the war earnings and the changes in the debtor's financial condition, this situation still exists. Appendix A to the debtor's petition herein shows net current assets of $22,090,504 out of which, of course, the debtor must retain a sufficient sum for working capital. Against this, there are overdue debts of $38,303,211 made up as follows:

First Terminal & Unifying Mortgage Bonds[1]	$ 8,063,000
Chase National Bank Note	3,500,000
Mississippi Valley Trust Company Note	1,000,000
Reconstruction Finance Corporation Note (bought by Southern Pacific)	17,882,250
Stephenville N. & S. T. R. Co. Bonds	2,234,903[2]
Central Ark. & E. R. Co. Bonds	932,232[2]
Total interest in default	4,690,826
	$38,303,211

[1] The maturity of these bonds was accelerated by Guaranty Trust Company, Trustee.

[2] These figures are from the opinion of the Circuit Court of Appeals, below, 157 F. 2d. 337, 402-403.

Thus, for two reasons, whether or not this debtor is solvent in the bankruptcy sense, is irrelevant and immaterial. First, these proceedings are based on inability to meet debts as they mature, a condition which still exists. Second, regardless of solvency, any capitalization must be one which the earnings can support.

POINT IV.

The so-called "changed conditions" were in the contemplation of the Interstate Commerce Commission at the time it formulated the plan of reorganization.

The three petitioners contend that changed conditions, in the form of "solvency" of the debtor and increased earnings make the plan inequitable now, and require its referral back to the Interstate Commerce Commission. Their point relative to solvency was discussed under Point III above, which discussion will not be repeated. As to the increased earnings, none of the petitioners contend that the plan was inequitable for that reason at the time the plan was formulated by the Commission or certified to the District Court.

The Bankruptcy Act provides (11 U. S. C. §205(e)):

> "*Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that *at the time of the finding*[3] the corporation is insolvent, or that *at the time of the finding* the equity of such class of stockholders has no value, * * *.
>
> "*Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that * * * *at the time of the finding* the interests of such class of creditors have no value, * * *."

[3] All italics in quotations herein are supplied unless the contrary is indicated.

Thus, the Bankruptcy Act provides that the cut-off date for determining the interest of a claimant, whether a creditor or a stockholder, is *the time of the finding* thereon by the Commission. Thus the cut-off date is fixed by the statute at a time when the reorganization is still before the Interstate Commerce Commission. The District Court is not required by the Bankruptcy Act to make a new finding. All it may do is affirm "the finding, * * * that at the time of the finding the equity of such class of stockholders has no value, * * *." The petitioners herein do not attack the finding of the Interstate Commerce Commission at the time the finding was made. Therefore the basis for their contentions arising out of "changed conditions" must arise out of reliance upon the general equity powers inherent in a court of bankruptcy.

Such inherent powers are also recognized by the Bankruptcy Act (11 U. S. C. §205(e)):

> "Upon the certification of a plan by the Commission to the court, * * * such parties shall file, * * * detailed and specific objections in writing to the plan *and their claims for equitable treatment.*"

Such is also the necessary effect of the decisions of this Court in *Ecker v. Western Pacific Railroad Corporation, Supra; Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., supra;* and *Reconstruction Finance Corporation v. Denver & Rio Grande Western Railroad Company, supra.*

In the *Western Pacific* Case, this Court considered the contention of changed conditions, but decided that the claimants for equitable treatment had not shown any such changed conditions as would justify disapproval of the Commission plan (1. c. 509):

> "The Commission's forecast was made with knowledge and not in disregard of past fluctuations of in-

> come, in war and in peace. On the showing as to changed conditions made before the District Court, there was no basis for a disapproval of the Commission plan as unfair to the junior equities. The further evidence of increased earnings, placed in the record by the stipulations, does not lead us to reject the Commission's plan."

In the *Milwaukee* Case, the contention was similarly handled (1. c. 543-544):

> "We agree with the Circuit Court of Appeals that no sufficient showing of changed circumstances has been made which requires the District Court to return the plan to the Commission for reconsideration. * * * As we have noted, the Commission conceived as its responsibility the devising of a plan which would serve 'as a basis for the company's financial structure for the indefinite future.' We cannot assume that the figures of war earnings could serve as a reliable criterion for that 'indefinite future'. As some of the bondholders point out, the bulge of war earnings per se is unreliable for use as a norm unless history is to be ignored; and numerous other considerations, present here as in former periods, make them suspect as a standard for any reasonably likely future normal year. * * * In view of these considerations *we cannot say that the junior interests have carried the burden which they properly have* of showing that subsequent events make necessary a rejection of the Commission's plan."

Those two cases, as the present one, involved attacks upon the approval of a plan, and the reliance upon the general equity power of the court is not clearly pointed up. However, the *Denver & Rio Grande* Case was squarely bottomed on that power.

In that case, the order subject to review was one confirming a plan which had not received the required number of acceptances, such confirmation being based upon a find-

ing that such non-assenting creditors were not "reasonably justified" (11 U. S. C. §205(e)) in failing to accept the plan. In determining whether such creditors were "reasonably justified" it was necessary for the court, in the absence of statutory guidance, to exercise its general equity powers. In upholding the confirmation of the plan, this Court said (1. c. 90 L. ed. 1148):

> "Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan."

This Court, however, found that there were no changed conditions which had not been envisaged by the Commission, and therefore held that the non-acceptance of the plan was not reasonably justified.

The position of the petitioners herein, therefore, must be that the Interstate Commerce Commission, in March of 1942 (the date of its Supplemental Report), failed to envisage the extent of the war and post-war earnings of the debtor, and the changes made and which can be made as a result of the large accumulation of earnings. None of the petitioners have stated what must be their basic assumption, i. e., that the increased earnings and their results are so great as conclusively to show that the Commission could not possibly have envisaged them. None of them adduces any facts or arguments to show that the Commission so failed.

In the *Denver & Rio Grande* Case, *supra*, this Court said (1. c. 90 L. ed. 1148-1150):

> "We have pointed out in the section of this opinion dealing with the allocations of the securities that a

part of the compensation to senior claimants for their loss of position was the opportunity to participate in war earnings. This was understood by the District Court and the Commission. Accumulations of cash beyond operating fund needs are in the same category. * * *

"The error of the Circuit Court in its holding set out above lies in its assumption that the senior bondholders were paid in full by the securities allotted to them without also accepting the determination of the Commission that the assets represented as of January 1, 1943, and all subsequent earnings were a part also of the common stock that was awarded the senior bondholders. * * *

"Under our determination that the creditors who received common stock were compensated partly by the assets and future earnings, it is obvious that the use of such assets to retire senior claims is a part of the normal and expected increment from holdings of common stock. * * * When proposed capitalization is being planned on earnings, a reduction of senior capital without reduction of estimated earnings increases possible junior capital within the scheme. When the reduction of senior capital takes place after the adoption of the plan by the use of anticipated earnings or existing cash, there can be no such readjustment of junior participation because assets in the balance sheet at the adoption of the plan and subsequent earnings are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash."

This policy was reemphasized and reaffirmed by this Court in the second appeal in the *Denver & Rio Grande* Case (*Insurance Group Committee v. The Denver & Rio Grande Western Railroad Company*, ... U. S. ....., (February 3, 1947), as follows:

"The Commission made no finding that the cash value of the securities allocated to the senior creditors

paid them in full. To justify the change of position of creditors from fully secured to partially secured, creditors were given opportunities to participate in profits through common stock ownership *with a chance at larger earnings than the Commission's forecast anticipated.* We held the priority rule was satisfied by this type of allocation. This was explained by our decision on the last review. Slip opinion, *supra,* p. 15. The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor. We think the absence of such an allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.

"Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support."

The petitioners have submitted no facts to show either (a) that the war and post-war earnings and their results were not, and could not have been, envisaged by the Commission, or (b) stating it differently, that the war and post-war earnings and their results are such as to require the court to exercise its general equity power to set aside a plan, fair when adopted, on the grounds that events subsequent to its adoption make it grossly inequitable, or (c) that the cash value of the securities allocated to the senior creditors paid them in full. Rather, the record supports the plan of the Commission. Over a twenty-four year period, the average earnings of the debtor would only have made available for the proposed common stock to be issued under

the plan, annual earnings of approximately $7.82 per share.[4] Such earnings would hardly seem to justify, much less *require*, such exercise of a general equitable power and further, seem to indicate that the Commission must have envisaged the large war and post-war earnings.

Under the plan, the earliest maturity of any debt of any consequence is that of the First Mortgage Certificates in 1989, (the new Consolidated Mortgage Bonds are not to mature until 1992). Hence, the Interstate Commerce Commission must have been considering a financial structure

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[4] This computation makes no adjustments (a) to conform any of the Debtor's figures to those authorized by the Interstate Commerce Commission, (b) for increase in Federal income taxes had the Debtor's interest charges been the lower amounts called for by the plan, nor (c) for the recent rate increase. The figures for the years 1923-1944, inclusive are from R. 5657, for the year 1945, from R. 5727, and for 1946 from the estimate on page 11 of the petition herein of Southern Pacific Company. The figure of Undisturbed fixed charges eliminates the interest on the Railroad Credit Corporation notes.

1923	$5,929,628	1935	$2,695,111
1924	5,028,749	1936	3,333,243
1925	5,057,460	1937	2,304,505
1926	5,072,628	1938	2,088,299
1927	4,692,923	1939	1,199,158
1928	4,382,449	1940	2,860,221
1929	3,714,052	1941	7,495,940
1930	2,380,379	1942	8,692,636
1931	2,710,861	1943	10,562,547
1932	(125,857)	1944	11,133,608
1933	1,840,184	1945	7,001,641
1934	2,024,891	1946	7,000,000

Average income of the twenty-four years 1923 to 1946, inclusive		$4,544,802
Less charges under plan (R. 3785, 3797, 3798):		
Undisturbed fixed charges	$872,970	
New mortgage interest	587,501	
Capital fund	500,000	
Sinking fund	179,763	
Preferred dividends	937,505	3,077,739
Available for common dividends		$1,467,063
Earnings per common share		$7.82

which would weather the possible vissisitudes of almost half a century, and it might well contemplate further wars and major depressions during that period. A capitalization which, over a twenty-four year period including a boom, a major depression and a war boom, only averages $7.82 per share for the common stock, supports the wisdom and experience of the Interstate Commerce Commission.

The petitioners urge that because the plan in this reorganization has been criticized before Congress, this Court should order the plan referred back to the Interstate Commerce Commission. In the first *Denver & Rio Grande* Case, *supra*, this Court restated its duty as one to follow the dictates of Congress and not to attempt to anticipate Congressional action. This Court said (1. c. 90 L. ed. 1139-1141):

> "The agencies employed by Congress to accomplish reorganizations under Section 77 were the Interstate Commerce Commission and the courts. The answer reached by Congress was that the experience and judgment of the Commission must be relied upon for final determinations of value and of matters affecting the public interest, subject to judicial review to assure compliance with Constitutional and statutory requirements. * * *

(1. c. 90 L. ed. 1142-1143):

> "* * * Our constructions of the chief provisions of the section were handed down in March, 1943. Although the results of reorganizations under the section as thus construed, have been criticized as unfortunate and changes have been suggested, no different legislation has been enacted. Indeed a different method for reorganization, enacted in 1939 and designed to meet the requirements of railroads not in need of financial reorganization of the character provided by Section 77 but only of an opportunity for voluntary adjustments with their creditors, terminated on July 31, 1940, and a comparable provision made in 1942 was allowed to

> lapse on November 1, 1945.[5] This situation leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under Section 77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of Section 77 read in the light of the contemporaneous discussion in Congress."

The obligation of this Court to ignore public pressure and to act under the existing law, and to refrain from attempting to anticipate Congressional action, was reaffirmed by this Court in *Insurance Group Committee v. The Denver & Rio Grande Western Railroad Company*, ... U. S. ..... (February 3, 1947), where it said:

> "* * * Nor do we see that the action of Congress in passing S. 1253, on July 31, 1946, should persuade us to require a stay to await further enactments that might affect this reorganization. It was vetoed. President's Memorandum of Disapproval, August 13, 1946. Our understanding of our duties under the Railroad Reorganization Act, in the face of strong criticism of its provisions, was expressed in the former review of this plan, slip opinion, p. 9. It need not be repeated. We must continue to act under the now existing law. Whether or not changes may be made that will affect this reorganization, we do not know."

In addition, this Court has expressed its appreciation of the Congressional purpose to eliminate delays in rail-

---

[5] Similar legislation, embodied in S. 249, is now before Congress. This proposed law does not apply to reorganizations of railroads now in receivership proceedings or under Section 77, and thus differs materially from the vetoed legislation discussed at length by Mr. Justice Frankfurter in his dissent in *Insurance Group Committee v. The Denver & Rio Grande Western Railroad Company*, ... U. S. ..... (February 3, 1947). Furthermore, this difference would seem to support the decision of the majority in that case that this Court must continue to act under the now existing law. S. 249 is printed as Appendix B hereto.

road reorganizations. As pointed out above, this debtor has been in reorganization more than twelve years, including more than five years before the Interstate Commerce Commission. If these proceedings are referred back to the Commission, twelve years will in large part be lost, with no assurance that some litigious person will not again unduly delay these proceedings.

Another result of such referral might well be a plan formulated by the Interstate Commerce Commission during abnormally good years, but which would reach this Court during depression years, and therefore be referred back to the Interstate Commerce Commission a third time. The only escape of the debtor from such a vicious circle would be a dismissal under Section 77(g) (11 U. S. C. §205 (g)), which might leave the debtor still unable to meet its debts and still unreorganized.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should not issue.

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Dated: February 11, 1947.

APPENDIX A.

11 U. S. C. §205 (d)(e) and (g):

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem

necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge,

except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate

action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and

stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

"(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order."

APPENDIX B.

80TH CONGRESS
1ST SESSION

S. 249

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1947

MR. WHITE (by request) introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce

A BILL

To amend the Interstate Commerce Act, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to be in aid of the national transportation policy of the Congress, as set forth in the preamble of the Interstate Commerce Act, as amended, in order to promote the public interest in avoiding the deterioration of service and the interruption of employment which inevitably attend the threat of financial difficulties and which follow upon financial collapse and in order to promote the public interest in increased stability of values of railroad securities with resulting greater confidence therein of investors, to assure, insofar as possible, continuity of sound financial condition of common carriers subject to part I of said Act, and to enable said common carriers, insofar as possible, to avoid prospective financial difficulties, inability to meet debts as they mature, and insolvency. To assist in

accomplishing these ends and because certain classes of the obligations of such carriers are in the usual case held by a very large number of holders, and further to enable modification and reformation of provisions of the aforesaid classes of obligations and of provisions of the instruments pursuant to which they are issued or by which they are secured in cases where such modification and reformation shall have become necessary or desirable in the public interest in order to avoid obstruction to or interference with the economical, efficient, and orderly conduct by such carriers of their affairs, it is deemed necessary to provide means, in the manner and with the safeguards herein provided, for the alteration and modification, without the assent of every holder thereof, of the provisions of such classes of obligations and of the instruments pursuant to which they are outstanding or by which they are secured.

Part I of the Interstate Commerce Act, as amended, is amended by adding after section 20a the following new section:

"20b. (1) It shall be lawful (any express provision contained in any mortgage, indenture, deed of trust, or other instrument to the contrary notwithstanding), with the approval and authorization of the Commission, as provided in paragraph (2) hereof, for a carrier as defined in section 20a (1) of this part (other than a carrier in equity receivership or in process of reorganization under section 77 of the Bankruptcy Act) to alter or modify (a) any provision of any class or classes of its bonds, notes, debentures, or other evidences of indebtedness (whether secured, unsecured, matured, or unmatured) issued under any mortgage, indenture, deed of trust, or other instrument of like nature, such bonds, notes, debentures, or other evidences of indebtedness being hereinafter in this section sometimes called 'obligations'; (b) any provision of any mortgage, indenture, deed of trust, or other instrument pursuant to which any class of its obligations shall have been issued or by which any class of its obligations is secured: *Provided,* That the provisions of this section shall not apply to any equipment-trust certi-

ficates in respect of which a carrier is obligated, or to any evidences of indebtedness of a carrier the payment of which is secured in any manner solely by equipment, or to any instrument, whether an agreement, lease, conditional-sale agreement, or otherwise, pursuant to which such equipment-trust certificates or such evidences of indebtedness shall have been issued or by which they are secured.

"(2) Whenever an alteration or modification is proposed under paragraph (1) hereof, the carrier seeking authority therefor shall, pursuant to such rules and regulations as the Commission shall prescribe, present an application to the Commission. Upon presentation of any such application, the Commission may, in its discretion, but need not, as a condition precedent to further consideration, require the applicant to secure assurances of assent to such alteration or modification by holders of such percentage of the aggregate principal amount outstanding of the obligations affected by such alteration or modification as the Commission shall in its discretion determine. If the Commission shall not require the applicant to secure any such assurance, or when such assurances as the Commission may require shall have been secured, the Commission shall set such application for public hearing and the carrier shall give such notice of such hearing in such manner, by advertisement or otherwise, as the Commission may find practicable and may direct, to holders of such of its classes of securities and to such other persons in interest as the Commission shall determine to be appropriate and shall direct. If the Commission, after hearing, in addition to making (in any case where such alteration or modification involves an issuance of securities) the findings required by paragraph (2) of section 20a, shall find that, subject to such terms and conditions and with such amendments as it shall determine to be just and reasonable, the proposed alteration or modification—

"(a) is within the scope of paragraph (1);

"(b) will be in the public interest;

"(c) will be in the best interests of the carrier, of each class of its stockholders, and of the holders of each class of its obligations affected by such modification or alteration; and

"(d) will not be adverse to the interests of any creditor of the carrier not affected by such modification or alteration

then (unless the applicant carrier shall withdraw its application) the Commission shall cause the carrier, in such manner as it shall direct, to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any) to the holders of each class of its obligations affected thereby, for acceptance or rejection. All letters, circulars, advertisements, and other communications, and all financial and statistical statements, or summaries thereof, to be used in soliciting the assents or the opposition of such holders shall, before being so used, be submitted to the Commission for its approval as to correctness and sufficiency of the material facts stated therein. If the Commission shall find that as a result of such submission the proposed alteration or modification has been assented to by the holders of at least 75 per centum of the aggregate principal amount outstanding of each class of obligations affected thereby (or in any case where 75 per centum thereof is held by fewer than twenty-five holders, such larger percentage, if any, as the Commission may determine to be just and reasonable and in the public interest), the Commission shall enter an order approving and authorizing the proposed alteration or modification upon the terms and conditions and with the amendments, if any, so determined to be just and reasonable. Such order shall make provision as to the time when such alteration or modification shall become and be binding, which may be upon publication of a declaration to that effect by the carrier, or otherwise, as the Commission may determine. Any alteration or modification which shall become and be binding pursuant to the approval and authority of the Commission hereunder shall be binding upon each holder of any obligation of the carrier of each class affected by such alteration

or modification, and upon any trustee or other party to any instrument under which any such class of obligations shall have been issued or by which it is secured, and when any alteration or modification shall become and be binding the rights of each such holder and of any such trustee or other party shall be correspondingly altered or modified.

"(3) For the purposes of this section a class of obligations shall be deemed to be affected by any modification or alteration proposed only (a) if a modification or alteration is proposed as to any provision of such class of obligations, or (b) if any modification or alteration is proposed as to any provision of any instrument pursuant to which such class of obligations shall have been issued or shall be secured: *Provided*, That in any case where more than one class of obligations shall have been issued, and be outstanding or shall be secured pursuant to any instrument, any alteration or modification proposed as to any provision of such instrument which does not relate to all of the classes of obligations issued thereunder, shall be deemed to affect only the class or classes of obligations to which such alteration or modification is related. For the purpose of the finding of the Commission referred to in paragraph (2) of this section as to whether the required percentage of the aggregate principal amount outstanding of each class of obligations affected by any proposed alteration or modification has assented to the making of such alteration or modification, any obligation which secures any evidence or evidences of indebtedness of the carrier or of any company controlling or controlled by the carrier shall be deemed to be outstanding unless the Commission in its discretion determines that the proposed alteration or modification does not materially affect the interests of the holder or holders of the evidence or evidences of indebtedness secured by such obligation. Whenever any such pledged obligation is, for said purposes, to be deemed outstanding, assent in respect of such obligations, as to any proposed alteration or modification, may be given only (any express or implied provision in any mortgage, indenture, deed of trust, note, or other instrument to the contrary notwithstanding) as

follows: (a) Where such obligation is pledged as security under a mortgage, indenture, deed of trust, or other instrument, pursuant to which any evidences of indebtedness are issued and outstanding, by the holders of a majority in principal amount of such evidences of indebtedness; or (b) where such obligation secures an evidence or evidences of indebtedness not issued pursuant to such a mortgage, indenture, deed of trust, or other instrument, by the holder or holders of such evidence or evidences of indebtedness; and in any such case the Commission, in addition to the submission referred to in paragraph (2) of this section, shall cause the carrier in such manner as it shall direct to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any, as the Commission shall have determined to be just and reasonable) for acceptance or rejection, to the holders of the evidences of indebtedness issued and outstanding pursuant to such mortgage, indenture, deed of trust, or other instrument, or to the holder or holders of such evidence or evidences of indebtedness not so issued, and such proposed alteration or modification need not be submitted to the trustee of any such mortgage, indenture, deed of trust, or other instrument, but assent in respect of any such obligation shall be determined as hereinbefore in this section provided. For the purposes of this section an obligation or an evidence of indebtedness shall not be deemed to be outstanding if in the determination of the Commission the assent of the holder thereof to any proposed alteration or modification is within the control of the carrier or of any person or persons controlling the carrier.

"(4) (a) Any authorization and approval hereunder of any alteration or modification of a provision of any class of obligations of a carrier or of a provision of any instrument pursuant to which a class of obligations has been issued, or by which it is secured, shall be deemed to constitute authorization and approval of a corresponding alteration or modification of the obligation of any other carrier which has assumed liability in respect of such class of obligations as guarantor, endorser, surety, or otherwise: *Pro-*

vided. That such other carrier consents in writing to such alteration or modification of such class of obligations in respect of which it has assumed liability or of the instrument pursuant to which such class of obligations has been issued or by which it is secured and, such consent having been given, any such corresponding alteration or modification shall become effective, without other action, when the alteration or modification of such class of obligations or of such instrument shall become and be binding.

"(b) Any person who is liable or obligated contingently or otherwise on any class or classes of obligations issued by a carrier shall, with respect to such class or classes of obligations, for the purposes of this section, be deemed a carrier.

"(5) The authority conferred by this section shall be exclusive and plenary and any carrier, in respect of any alteration or modification authorized and approved by the Commission hereunder, shall have full power to make any such alteration or modification and to take any actions incidental or appropriate thereto, and may make any such alteration or modification and take any such actions, and any such alteration or modification may be made without securing the approval of the Commission under any other section of this Act or other paragraph of this section, and without securing approval of any State authority, and any carrier and its officers and employees and any other persons, participating in the making of an alteration or modification approved and authorized under the provisions of this section or the taking of any such actions, shall be, and they hereby are, relieved from the operation of all restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to make and carry into effect the alteration or modification so approved and authorized, in accordance with the conditions and with the amendments, if any, imposed by the Commission. Any power granted by this section to any carrier shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. The provisions of this section shall not

affect in any way the negotiability of any obligation of any carrier or of the obligation of any carrier which has assumed liability in respect thereto.

"(6) The Commission shall require periodical or special reports from each carrier which shall hereafter secure from the Commission approval and authorization of any alteration or modification under this section, which shall show, in such detail as the Commission may require, the action taken by the carrier in the making of such alteration or modification.

"(7) The provisions of this section are permissive and not mandatory and shall not require any carrier to obtain authorization and approval of the Commission hereunder for the making of any alteration or modification of any provision of any of its obligations or of any class thereof or of any provision of any mortgage, indenture, deed of trust, or other instrument, which it may be able lawfully to make in any other manner, whether by reason of provisions for the making of such alteration or modification in any such mortgage, indenture, deed of trust, or other instrument, or otherwise: *Provided*, That the provisions of paragraph (2) of section 20a, if applicable to such alteration or modification made otherwise than pursuant to the provisions of this section, shall continue to be so applicable.

"(8) The provisions of paragraph (6) of section 20a, except the provisions thereof in respect of hearings, shall apply to applications made under this section. In connection with any order entered by the Commission pursuant to paragraph (2) hereof, the Commission may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any such order, subject always to the requirements of said paragraph (2).

"(9) The provisions of subdivision (a) of section 14 of the Securities Exchange Act of 1934 shall not apply to any solicitation in connection with a proposed alteration or modification pursuant to this section.

"(10) The Commission shall have the power to make such rules and regulations appropriate to its administration of the provisions of this section as it shall deem necessary or desirable."

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FEB 12 1947
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 879

SOUTHERN PACIFIC COMPANY,
a railroad corporation, Intervener, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*, *Respondents.*

No. 909

WALTER E. MEYER, Intervener, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*, *Respondents.*

No. 936

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation, Debtor, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*, *Respondents.*

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT

The respondent, Guaranty Trust Company of New York, Trustee under the Debtor's First Terminal and Unifying Mortgage, files this brief in support of its prayer

that this Court deny the petitions of the Debtor, Southern Pacific Company and Walter E. Meyer requesting this Court to review the decision of the Circuit Court of Appeals for the 8th Circuit affirming the District Court's order approving a plan of reorganization for the St. Louis Southwestern Railway Company.

Opinions Below

District Court—53 F. Supp. 914 (R. 5183-5213)
Circuit Court of Appeals—152 F. (2d) 337 (R. 5559-5683)

Jurisdiction

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

The Property Involved

The St. Louis Southwestern Railway system lines comprise a group of railroads operating with main lines and branches from St. Louis, Missouri, and Memphis, Tennessee, to Shreveport, Louisiana, and points in Texas, the principal termini in Texas being at Corsicana and Fort Worth. The total road mileage operated by the system when the reorganization proceedings commenced was 1,749 miles. The Commission has found that traffic on the Debtor's main line is "highly competitive", and that its branch line traffic is "very light" (R. 3502). The Debtor must compete for traffic in the Southwest area with the Missouri-Pacific, St. Louis-San Francisco, Missouri-Kansas-Texas, and Kansas City Southern Railroads (R. 5581).

Statement of the Case

This proceeding was begun on December 12, 1935, when the Debtor filed its petition under Section 77 of the Bankruptcy Act. Similar petitions were filed by Debtor's three

subsidiaries, St. Louis Southwestern Railway Company of Texas, Central Arkansas and Eastern Railroad Company and Stephenville North and South Texas Railway Company. All objections to the Debtor's petition were overruled, and on January 3, 1936, one Trustee was appointed for the four Debtors.

Hearings on the plans of reorganization filed by the Debtor and others were begun March 16, 1937, and concluded April 24, 1937. The Examiner's Proposed Report was issued February 7, 1938, and objections thereon were argued before the Commission on May 16, 1938.

On January 10, 1939, the Commission reopened the proceedings for the purpose of receiving further evidence relating to the charges made by petitioner Meyer with respect to the effect upon the Debtor's earnings and assets of Southern Pacific's alleged diversion of traffic and failure to solicit traffic preferentially (R. 500-501). Thereafter, hearings were held for this sole purpose from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 529). At these hearings a vast amount of evidence, including hundreds of exhibits, was introduced (R. 529-2680, 2681-3055). The extensive record made at these hearings contained exhaustive studies of the earnings history of the Debtor upon which the Commission founded its finding as to the Debtor's prospective earning power.

On June 30, 1941, the Commission issued its initial Report and Order setting forth its plan of reorganization for the Debtor (R. 3495-3735; 249 I. C. C. 5). 131 pages of the Report are devoted to an elaborate consideration and rejection of the Meyer charges (R. 3547-3678). The plan reduced the Debtor's total capitalization from approximately $107,000,000 to $75,000,000 and fixed charges from approximately $3,400,000 to $1,500,000.

Petitions for modification of the plan were filed by various interveners, and on March 9, 1942, the Commission issued its Supplemental Report and Order, which modified its original plan in certain relatively minor respects but which reaffirmed the same so far as the present petitions

are concerned (R. 3736-3820; 252 I. C. C. 325). The modified plan was certified by the Commission to the District Court March 23, 1942 (R. 3494-3495).

From October 26, 1942, to November 5, 1942, hearings were held before the late Judge Davis upon objections to the certified plan at which additional evidence, including data as to the vastly increased earnings of the preceding two years, was presented (R. 4051-5136). The great bulk of such additional evidence related to the charges made by Walter E. Meyer against Southern Pacific (R. 4157-4199, 4202-4209, 4304-5136). Prior to the filing of briefs in support of the plan and objections thereto, Judge Davis died. The case was then referred to Judge Moore (R. 5138) who on April 23, 1943, entered an order directing a reargument on May 31, 1943, upon the case as submitted before Judge Davis, with all parties having the right to apply for leave to present additional testimony (R. 5181-5183). On February 8, 1944, the District Court filed an opinion and entered an order in which it rejected the contentions of the objectors and approved the certified plan.

Appeals were taken in March, 1944, to the Circuit Court of Appeals for the 8th Circuit by Southern Pacific, Walter E. Meyer, protective committees for the Stephenville and Central Arkansas bonds, respectively, and the Debtor, but due to the necessity of printing an inordinately voluminous record, argument was delayed until April 6, 1945. The Circuit Court handed down its decision August 26, 1946.

The Plan of Reorganization

Since the primary complaint of petitioners is not as to the terms of the Commission's plan of reorganization, but as to its alleged obsolete character, no elaborate discussion of the terms of the plan is required. It will suffice to say that the Commission's plan of reorganization for the Debtor calls for a capitalization of approximately $75,000,000 and fixed charges of approximately $1,500,000. The Debtor's

capitalization at the time it went into reorganization was $107,124,950, and fixed charges were, $3,379,341. (R. 3506, 3691)

Questions Presented

Only two questions are presented by the petitions for writs of certiorari:

First, whether changed conditions have occurred which were unanticipated by the Commission and which warrant review by this Court.

Second, whether the Commission has given proper consideration and disposition to petitioner Meyer's special charges of illegal control of the Debtor by Southern Pacific.

POINT I

The Petitioner's allegations regarding changed conditions do not warrant a return of the plan to the Commission.

In final analysis, the petitions for review by this Court of the fairness of the Commission's plan of reorganization for the Debtor are based primarily on the theory of changed conditions. This theory is rested upon two basic premises: one, that the reduction in the Debtor's defaulted interest obligations and other indebtedness and the increase in its current asset position has rendered the Debtor solvent; and two, that the Debtor has shown an earning power unanticipated by the Commission. Respondents believe that the first premise is contrary to the principles laid down by this Court and that the second can not be sustained on the meager additions to the record offered with the petitions, being a mere assertion by the petitioners as opposed to the expert judgment of the Commission.

The Petitioner's Theory Of Solvency Of The Debtor Is Unsound

All three petitioners rely heavily upon an alleged solvency of the Debtor in the bankruptcy sense resulting from cash distributions directed by the District Court and from

an improvement in the current asset position of the Debtor. As petitioner Southern Pacific states it: "The case for the present solvency of the Debtor is presented upon the basis of reduction in debt and improvement in current liquid assets" (Petition p. 8). Respondents believe that the fallacies in the position of petitioners lie in their disregard of the principles settled by this Court as to the effect of debt reduction and increase in current assets after the effective date of a plan, in their misconception of the significance of the Commission's proposed new total capitalization, and in their failure to analyze the effect of cash distributions under the plan.

(a) The decrease in debt and increase in current assets is for the benefit of the new security holders.

The effective date of the plan of reorganization in these proceedings is January 1, 1942. This Court has consistently held that it is for the Commission alone to determine the effective date of a plan of reorganization. *R. F. C.* v. *Denver & Rio Grande Western R. R. Co.*, 90 L. Ed. 1134, p. 1148; *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 509; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 546. The practical reason for this ruling was well stated by the Circuit Court of Appeals for the Second Circuit in *Old Colony Bondholders* v. *New York, New Haven & Hartford Railroad Company*, C. C. H. Bankruptcy Service, Par. 55,813 January 13, 1947, where the Court said (p. 58,527):

> "* * * As a practical matter some closing time must be set and it cannot be progressively postponed without reopening the issues and making new findings, with resulting new appeals. By the time these are finished conditions may again have changed, so on *ad infinitum*. See *Interstate Commerce Comm.* v. *Jersey City, supra*, * * *"

Starting with this premise in the *Denver* case, this Court laid down the principles with respect to the effect of

reduction in debt and increase in current assets in a reorganization proceeding subsequent to the effective date which, respondents submit, govern the issues petitioners now seek to raise.

Petitioners' primary argument of changed conditions is founded on actual and assumed reductions of debt funded in the plan resulting from cash distributions made since the effective date of the plan. However, this same argument was made before this Court in the *Denver* case and rejected. There the effective date of the plan was January 1, 1943. Among the obligations of the Debtor funded in the plan as of that date were $2,758,330 of Rio Grande Junction Bonds. In addition, the plan provided for the assumption by the reorganized company of $5,758,000 of equipment obligations. Subsequent to the effective date the District Court authorized the Trustees to purchase the Junction Bonds and to pay off $1,218,000 of the equipment obligations. The capitalization of the new company was decreased proportionately. The Trustee for the most junior secured creditors protested that their participation should be increased by the amount of the debt reduction. The Circuit Court of Appeals for the Eighth Circuit accepted this argument and returned the plan to the District Court. This Court granted *certiorari* and reversed the Circuit Court on this point, stating (90 L. Ed. p. 1724):

> "* * * When the reduction of senior capital takes place after the adoption of the plan by use of anticipated earnings or existing cash, there can be no such readjustment of junior participation because assets in the balance sheet at the adoption of the plan and subsequent earnings are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash. * * *."

So too in the instant case the reduction of debt after the adoption of the plan is for the benefit of the new security holders. As the table on page 9 of the petition of Southern

Pacific shows, precisely the same kind of debt reduction has occurred, in part at least, in this case as in the *Denver* proceeding. Here guaranteed obligations, viz. the Texarkana Union Station certificates, were purchased and a reduction in equipment obligations effected. A secured obligation of the Railroad Credit Corporation was also paid off, which was contemplated and provided for in the plan. As this Court held in the *Denver* case, the benefit of this action accrues to the new security holders. In addition, in this proceeding funds sufficient to pay interest arrears on certain senior securities, but not directed to be applied for that purpose, were disbursed. But this does not affect the application of the doctrine enunciated by this Court in the *Denver* case to this proceeding. Under that doctrine if these payments also effected a reduction in debt after the effective date such reduction must be for the benefit of the new security holders.

Furthermore, under an additional holding of this Court in the *Denver* case, it appears plain that the cash from which these payments were made belongs to the creditors provided for under the plan, because it was acquired subsequent to the plan's effective date. In the *Denver* proceeding this Court stated (90 L. Ed. p. 1146):

> "There is another important factor, corollary to stock ownership, to be noted in the Commission's allocation of these securities. *This factor is that the creditors who received common stock to make them whole obtained with that common stock an interest in all cash on hand or all cash that might be accumulated.* * * * Cash, material and supplies, as well as all other assets and all liabilities of the debtor were represented by the securities. If there is more cash on hand than needed, for taxes, expenses and proper improvements, it is at the disposal of the common stockholders. If money was used to pay indebtedness, there would be a corresponding reduction in the capital structure. * * *" [Emphasis supplied].

The Circuit Court of Appeals in that case had said (150 F. (2d) at p. 35):

> "• • • we cannot disregard the fact that these huge surpluses actually exist. Their existence is an accomplished fact. It is also obvious that surpluses will continue to pile up for a reasonable time yet to come. We think any plan which fails to take this into account and which gives the Senior Bondholders their claims in full by substantially delivering the road to them, and gives them the surplus cash actually on hand and further enables them to receive in addition the excess war profits which are reasonably sure to come, is inherently inequitable and unfair, so long as there are classes of creditors whose claims are not fully satisfied."

As to this holding, this Court stated (90 L. Ed. p. 1148):

> "In our judgment this holding is erroneous.
>
> The effective date of the plan was fixed by the Commission as January 1, 1943. This was in its power. The allocation of the securities took into consideration the interest of the secured claims to that date. *Any gain or any loss after that time was a benefit or an injury to the new common stockholders and then sometimes to security holders in positions senior to them.* Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan" (Emphasis supplied).

The Commission in this case, as in the *Denver* reorganization, did envisage the factors upon which petitioners rely in their claim of changed conditions. At the time of its Supplemental Report in this proceeding the Commission had before it the Trustee's statements (which are filed regularly with the Commission) showing earnings avail-

able for fixed charges for 1940 of $2,860,221 as compared with $1,119,158 for 1939 and $7,495,940 for 1941 as compared with both those earlier figures. The Trustee's reports also showed an increase in net current assets over those existing when the petition was filed from a deficit of $23,771,707 to an excess of current assets over current liabilities of $8,010,813 as of December 31, 1941 (Debtor's petition p. 9). The Commission was fully aware of the certainty of further increases resulting from war earnings. In the face of these facts the Commission said:

> "* * * the new securities, in the amounts in which they will be exchanged for the securities and claims of the old company, properly compensate the holders of the old securities for the rights given up by them, *by the rights and shares of earnings accorded them in the new company.* * * * " (Emphasis supplied.) R. 3776)

Thus, the Commission plainly contemplated in this proceeding, as in the *Denver* case, that a part of the compensation of creditors for their sacrifices consisted of participation in good earnings in prosperous years and an improvement in the value of the securities issued them resulting from increased assets. It follows, therefore, that the arguments of the petitioners based upon an alleged increase of assets are directed to matters which this Court has held lie within the province of the Commission.

(b) The Commission's permissible total capitalization of $75,000,000 does not afford a basis for determining a balance sheet solvency.

A fundamental error in the solvency argument of the petitioners lies in their use of the figure of $75,000,000 as a starting point in setting up a balance sheet of assets and liabilities. The Commission's valuation in the form of a permissible capitalization was based not upon the value of the Debtor's various assets as of any specific date, but rather upon an overall valuation for reorganization pur-

poses, which was arrived at after consideration of "all the data of record" including "traffic and earnings to the latest available date" and "also future prospects of traffic and earnings" (R. 3741, 3774-75). Thus this valuation takes into consideration the prospect of large wartime earnings and the increase in the current asset position of the Debtor, which the Commission was aware would ensue. The war earnings for rail carriers were well known to the Commission by March 9, 1942, when it filed its Supplemental Report, as shown by its pertinent references thereto in its Annual Report for 1941, pp. 1-2, and the Commission took these factors into account in making its determination of a permissible capitalization. The permissible capitalization fixed by the Commission rested upon its informed judgment, taking into consideration estimated improved current asset position and earning power. This capitalization cannot be considered as an exact valuation of assets at any specific date.

This Court has recognized that earning power is the primary criterion in determining capitalization for reorganization purposes rather than a balance sheet tabulation of assets and liabilities (*Milwaukee & Western Pacific* cases, *supra*). Whether or not junior securities are "without value" must depend primarily on earning power as this Court ruled in the *Milwaukee* case 318 U. S. p. 539:

> "* * * it [was not] necessary for the Commission to make a precise finding as to the value of the road in order to eliminate the old stock from the plan. A finding as to the precise extent of the deficiency is not material or germane to the finding of 'no value' prescribed by § 77 (e). * * * The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn."

The entire solvency argument of petitioners is based upon their assumption that the Commission made a finding of "the precise extent of the deficiency" when it fixed the new

capitalization. But the Commission only made an overall valuation for reorganization purposes taking into consideration the prospective earnings (R. 3741, 3774-75) and other factors to which petitioners point as changed conditions necessitating amendment of the plan. Thus it is inaccurate to use the Commission's permissible capitalization as a starting point for a series of calculations intended to show the Debtor's present solvency through accumulation of assets sufficient to make up the supposed deficiency. As this Court stated in *Insurance Group Committee et al.* v. *The Denver and Rio Grande Western Railroad Company et al.* (15 U. S. Law Week, p. 4192, Feb. 3, 1947):

> "When the Interstate Commerce Commission finds the value of a railroad system by any means, the correctness of the result cannot be mathematically proved or disproved. The difficulties of appraisal are multiplied by the necessity of looking into the future to estimate earnings. Earnings estimates are made with allowance for changing economic conditions."

(c) No changed conditions have resulted from the cash distributions since the plan's effective date warranting review by this Court.

Under the terms of the plan, the District Court may direct that cash distributions made to senior creditors after the effective date shall be applied to the reduction in part of their claims. Yet, even if the court so applies whatever amount of the cash distributed since January 1, 1942, may be necessary to reduce or eliminate the unpaid interest claims of senior creditors and the amount of common stock is increased as a result of payment of the Railroad Credit Corporation loan, as provided in the plan, $1,584,709 of creditors' claims will receive no treatment under the plan:

Total permissible capitalization		$75,000,000
Deduct*: Equipment Trust Obligations paid off....	216,000	
Texarkana Union Station certificates paid off	315,000	
Interest Paid prior to effective date Funded Under Plan	400,000	
	931,000	931,000
		74,069,000
First Mortgage 4s	20,000,000	
Grays Point Terminal 5s	500,000	
Shreveport Bridge 5s	450,000	
Second Mortgage 5s	3,042,500	
First Terminal 5s	8,063,000	
General and Refunding 5s.....	#39,557,500	
Stephenville 5s	** 2,843,294	
Central Arkansas 5s	** 1,197,435	
		75,653,709
		(d) 1,584,709

If $1,584,709 of creditor claims are still unprovided for under the plan, there have plainly been no changed conditions resulting from cash distributions which warrant review of the plan by this Court.

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* No provision is made in the plan for reallocation of these amounts after payment of these obligations.

** Includes unpaid interest to 1/1/42 and after deducting salvage money that has been distributed.

Including Refunding Bonds pledged because Commission's plan treats such bonds as reduced to possession and accords holders of pledged bonds same treatment as public holders of Refunding Bonds.

(d) Deficiency. Even if securities released by payment of Equipment Trust Certificates, Texarkana Union Station Certificates and interest prior to January 1, 1942 are reallocated there would still remain unsatisfied claims of over $600,000.

The fact that the amount by which the creditors fail of complete satisfaction in face amount of new securities is now comparatively small, is of no consequence. Even if each creditor could now receive the full face amount of his claim in an equal face amount of new securities, it by no means follows that he has been made whole or that such a drastic unforeseen change in conditions has occurred necessitating a return of the plan to the Commission. This Court's recent ruling in *Insurance Group Committee et al.* v. *The Denver and Rio Grande Western Railroad et al.*, 15 U. S. Law Week 4189, p. 4191 places the burden upon the petitioners to show that the new securities over-compensate the creditors for their sacrifices in order to establish changed conditions invalidating a plan:

> "The Commission made no finding that the cash value of the securities allocated to the senior creditors paid them in full. To justify the change of position of creditors from fully secured to partially secured creditors were given opportunities to participate in profits through common stock ownership with a chance at larger earnings than the Commission's forecast anticipated. We held the priority rule was satisfied by this type of allocation. This was explained by our decision on the last review. Slip opinion, *supra*, p. 15. The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor. We think the absence of such an allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.
>
> Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 541."

These petitioners have made no allegation and offer no proof to show that the creditors provided for under the plan have received more in value than the face of their claims. There is, then, no warrant for a review of the plan by this Court or a reconsideration of the plan by the Commission.

As a matter of record, the cash distributed to the creditors has not materially aided the Debtor in so far as its need for reorganization is concerned. As shown by the Debtor's balance sheet as of October 31, 1946, Appendix B to Southern Pacific's petition, it is still unable to meet its matured and maturing debts. The Debtor's matured principal obligations are $25,064,394. In addition the Debtor is obligated in the principal sum of $17,882,250 to Southern Pacific, which sum is now due. Its matured unpaid interest obligations are $3,247,284, excluding $1,443,540 interest in default on Southern Pacific's claim. There is the further obligation to pay current interest on the Debtor's first mortgage bonds and its equipment obligations. The Debtor has available to meet its matured and maturing debts, cash and temporary cash investments of $22,989,923 and total current assets of $32,545,847. Total current liabilities amount to $10,455,343, leaving $22,090,504 net current assets to meet matured and maturing obligations of $28,311,678 excluding Southern Pacific's matured claim of $19,325,790, principal and interest. If this sum be included, the Debtor's matured obligations are $47,637,468. It cannot be said, then, that the improved cash position of the Debtor and its debt retirement has placed it in any position to fully meet its matured or maturing obligations. It is, therefore, a proper subject for reorganization and the fundamental consideration under such circumstances in the formulation of a reorganization plan is the Debtor's prospective earning power. The Commission has found that the Debtor's normal earning power is insufficient to warrant a capitalization which permits participation by the equity or even full compensation of the creditors. As we point out below, petitioners have completely failed to present substantial evidence which would justify a finding that the Commission's conclusion in this respect was in error.

Even were the Debtor able and required to repay its interest arrears only and be relieved of its obligation to pay its matured principal debts, the problem for reorganization purposes would still remain its ability to meet its obligations as they mature. The obligations which Debtor would have to meet in fixed charges on its existing debt under its present capital structure would amount to $3,008,634 annually as shown by the Debtor's annual report for 1945. On the basis of the property's historical earnings record and all other factors the Commission has found that the Debtor has been and will be unable to meet such heavy fixed charges apart from its maturing principal obligations. The petitioners offer no reliable evidence to establish clear error in this determination.

Petitioners Have Made No Valid Showing Of Changed Conditions With Respect To The Debtor's Earning Power

The petitioners' second charge of inequity resulting from changed conditions is founded upon an alleged error in judgment on the part of the Commission in its determination of the prospective earning power of the Debtor. However, the only evidence cited in support of this claim is the 10 months earning statement of the Debtor for 1946, statistics showing an increase of population in the southwest territory, and a theoretical industrial expansion in that area. On these tenuous factors alone petitioners contend that this Court should set aside the considered judgment of the Commission as to the Debtor's normal earning power based upon a review of all relevant data together with its vast experience and familiarity with such matters. This inadequate record, consisting primarily of hopeful predictions by petitioners, presents no valid reason for this Court to review the determination of the Commission based upon its expert judgment. The allegations relied upon here with respect to the Debtor's earnings and earning power were presented to the Circuit Court as recently as October 22, 1946, when that Court denied petitions for rehearing. The Circuit

Court, sitting in and fully familiar with the alleged industrial and population expansion in the territory served by the Debtor, found nothing in the petitioners' allegations warranting a change in the Commission's plan. As recently as June 10, 1946, this Court considered and rejected almost identical arguments in the *Denver* proceeding.* On the basis of the proof offered in this proceeding they must likewise be rejected.

The petitioners rely almost entirely upon the ten months earning statement of the Debtor to contradict the Commission's determination as to the Debtor's prospective earning power. However, the figures themselves, while apparently favorable, may not be relied upon implicitly unless there is available the underlying data from which the result is derived. It is impossible to tell what non-recurrent income is contained in the ten months statement or to what extent tax carry back credits or inadequate maintenance provisions are responsible for the favorable statement. Furthermore from other aspects the Debtor's earnings picture has not been as optimistic. The Cotton Belt reported gross revenues for the full year of 1946 of $46.6 million representing a decline of 28% from 1945.** This is a substantially larger decline than that recorded by St. Louis-San Francisco, which showed a drop of only 17%, or by Missouri-Pacific which showed a decline of but 20%, both of which railroads are competitors of the Debtor. Class I railroads in general showed a decline of about 15%. The substantial decline in the Debtor's earnings may be attributed to the phenomenal rate at which the company's traffic increased during war years, since the Debtor showed one of the greatest percentages of increase of traffic among Class

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* This ruling was reaffirmed February 3, 1947. *Insurance Group Committee et al.* v. *The Denver and Rio Grande Western Railroad et al.*, 15 U. S. Law Week p. 4190.

** The source of the statistics cited herein is Moody's Railroads Service.

I railroads in the country for the war years. The peak traffic year of 1944 was for the Debtor 386% above its 1935-39 average as compared with 281% for the Missouri-Pacific, 270% for the St. Louis-San Francisco and 246% for Class I railroads generally. An important factor to bear in mind in reviewing the Debtor's war time earnings record is that during this period the Debtor's traffic "received from connecting lines" increased to 68% of its total traffic as compared with approximately 52% for years just prior to the war. There is plainly no certainty that the Debtor will continue to receive the very substantial increase in revenue from this form of traffic. Viewed in this light it would be wholly unsound to question the expert judgment of the Commission as to the Debtor's normal earning power merely on the strength of a ten months earning statement for 1946. Respondents submit that the petitioners have made no adequate showing to warrant review by this Court of the determinations of the three tribunals which have passed upon the question.

POINT II

The special charges of petitioner Meyer with respect to Southern Pacific's alleged illegal control of the Debtor present no questions for review by this Court.

Petitioner Meyer has renewed in his application to this Court the arguments he has made throughout this proceeding before the Commission (and subsequently before the District Court and Circuit Court of Appeals) of injurious control of the Debtor by Southern Pacific and other railroads. Principally, his contentions are that an alleged diversion of traffic from the Debtor and failure to solicit traffic preferentially distorted the Debtor's earnings record and, therefore, rendered the Commission's judgment of its prospective earning power erroneous. As a corollary to this

charge petitioner Meyer maintains that Southern Pacific's claim against the Debtor should be subordinated because of its breach of fiduciary duty to the Debtor. Nothing would be gained by a detailed review of the evidence before the Commission (or that introduced before the District Court) upon which the Commission rested its finding that Meyer's charges were without merit, which finding the District Court and Circuit Court have affirmed. Respondents believe it sufficient to point out that under the applicable decisions the charges of petitioner Meyer are not a proper subject for consideration by this Court.

In *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, this Court made the following statement of the basic rule of administrative law:

> "So long as there is warrant in the record for the judgment of the expert body it must stand. * * * 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303, et seq."
>
> (Quoted with approval in *I. C. C.* v. *Jersey City*, 322 U. S., page 513).

A like rule has been laid down in connection with railroad reorganization proceedings under Section 77 where the scope of judicial review of Commission findings upon certain matters committed to its exclusive jurisdiction was defined as limited to ascertaining the existence of material evidence supporting the Commission's ruling and the observance of legal standards. *Western Pacific* case, *supra*, 318 U. S. p. 473.

It is well settled that the control of one carrier by another is a matter committed to the exclusive jurisdiction of the Interstate Commerce Commission (*New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, p. 26). The Commission

has given approval to the control of the Debtor by Southern Pacific (*St. Louis S. W. Ry. Control,* 180 I. C. C. 175). Under the doctrine of the foregoing cases, therefore, it must follow that the propriety of the exercise of such control is a matter also committed to the exclusive jurisdiction of the Commission. And if it is found that its determination with respect thereto rests upon a sufficient record, compiled after opportunity for hearing has been given, the area of permissible judicial review has been covered.

Plainly, the Commission's rejection of the charges of improper control in this case is founded upon an ample record with full opportunity to be heard. Petitioner Meyer introduced considerable evidence on the subject at the initial Commission hearing in March and April, 1937 (R. 168-212). From May 5th through May 27th and from September 18th through 30th, 1939, the Commission held hearings solely to hear evidence in connection with the Meyer charges. The record compiled on this matter alone exceeded 2,500 pages as well as hundreds of exhibits (R. 529-3055). That the Commission painstakingly reviewed and weighed this evidence is shown by its first report which, for the most part, is devoted to a discussion of the Meyer charges (R. 3547-3678). Meyer's objections to the Commission's findings in that report were considered and again rejected by the Commission in its supplemental report (R. 3742-3752). When the plan was certified to the District Court Mr. Meyer was permitted to adduce a formidable amount of additional evidence in support of his charges (R. 4157-4199, 4202-4209, 4304-5166). Both the District Court and the Circuit Court of Appeals reviewed this vast record, found it more than adequate and concluded that no evidence had been presented demonstrating palpable error in the Commission's findings. On the basis of this ample record and opportunity to be heard respondents believe that this Court's settled decisions preclude a review of the petitioner's special charges. The issues raised by Mr. Meyer "are matters requiring study by experts on railroad affairs, involving as they do, expert analysis of traffic movements, freight loadings, financial

statements and other data peculiarly within the comprehension of the I. C. C. . . . " (District Court opinion, 53 F. Supp. p. 927). They are clearly, therefore, not proper matters for consideration by this Court.

CONCLUSION

The petitions for certiorari should be denied.

Dated: February 10, 1947.

Respectfully submitted,

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as Trustee under the Debtors' First Terminal and Unifying Mortgage, Respondent

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Nos. 879, 909 AND 936.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

SOUTHERN PACIFIC COMPANY, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

WALTER E. MEYER, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION

OF

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK AND MISSISSIPPI VALLEY TRUST COMPANY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 879

SOUTHERN PACIFIC COMPANY, Petitioner

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

No. 909

WALTER E. MEYER, Petitioner

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

No. 936

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Petitioner

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION

OF

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK AND MISSISSIPPI VALLEY TRUST COMPANY.

Opinions Below.

The Report and Order of the Interstate Commerce Commission (herein called "Commission") of June 30, 1941 (R. 3495-3735) are reported in 249 I. C. C. 5, and its Supplemental Report and Order of March 9, 1942 (R. 3736-3820) are reported in 252 I. C. C. 325. The opinion of the District Court (R. 5183-5213) is reported in 53 F. Supp. 914. The opinion of the Circuit Court of Appeals (R. 5559-5683) is reported in 157 F. (2d) 337.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered August 26, 1946 (R. 5681-5683). Petitions for rehearing were denied October 22, 1946 (R. 5831). The petitions for writs of certiorari were filed, respectively, January 13, 1947 (No. 879), January 18, 1947 (No. 909), and January 21, 1947 (No. 936). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Principal Questions Presented.

(1) Whether the Circuit Court of Appeals erred in refusing to remand the proceedings to the Commission because of the Debtor's substantial earnings subsequent to the Commission's formulation of the Plan, as a result of which, it is alleged, the Debtor is no longer "insolvent"? (Nos. 879, 909, and 936.)

(2) Whether the Circuit Court of Appeals erred in refusing to remand the proceedings to the Commission because of events transpiring subsequent to the formulation of the

Plan, as a result of which, it is alleged, Debtor's earning power is now substantially greater than it was at the time the Commission formulated the Plan? (Nos. 879, 909, and 936.)

(3) Whether the Circuit Court of Appeals erred in holding that there was substantial evidence to sustain the Commission's findings, affirmed by the District Court,—

(a) that the Debtor's earnings were not impaired by reason of the breach of fiduciary or other obligations, or by violations of the anti-trust laws, on the part of Southern Pacific Company and others, and

(b) that the Southern Pacific Company has not been guilty of "wrongful, illegal and unconscionable" acts in respect of the Debtor? (No. 909.)

(4) Whether the Circuit Court of Appeals correctly held that the procedure followed by District Judge Moore upon the death of Judge Davis did not constitute an abuse of discretion? (No. 909.)

(5) Whether the Circuit Court of Appeals abused its discretion in denying the motion of Petitioner Meyer to remand the case to the Commission on the ground of alleged newly-discovered evidence? (No. 909.)

Statutes Involved.

These cases arise under Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A. 205). Pertinent provisions of Section 77, particularly subdivision (c) thereof, are quoted in appendices to the Petitions.

Statement.

The Debtor filed its petition for reorganization under Section 77 of the Bankruptcy Act on December 12, 1935 (R. 24-27), and thereafter similar petitions were filed by its three subsidiaries (R. 57-76). Objections to Debtor's petition by Walter E. Meyer and others (R. 83-87) were overruled by the District Court (R. 87-91). On January 3, 1936, a Trustee was appointed (R. 93-96).

On December 7, 1936, Debtor filed a proposed plan of reorganization; and thereafter other plans were filed (R. 3515-3546). Hearings on all these plans were begun before the Commission on March 16, 1937, and concluded on April 24, 1937 (R. 96-216). A substantial portion of the testimony related to various charges against Southern Pacific Company by Walter E. Meyer (R. 168-212).

In April, 1937, Walter E. Meyer filed with the Commission a voluminous petition for an investigation of his said charges (R. 339-351), which was followed on June 19, 1937, by an amended and supplemental petition for investigation and for reopening the proceedings (R. 357-467). These petitions were denied by the Commission on July 12, 1937 (R. 479-480).

On February 7, 1938, Examiner Walsh of the Commission issued a Proposed Report containing a plan which varied from the plans theretofore submitted (R. 255-339),[1] in which he rejected Mr. Meyer's contentions (R. 306-314).

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[1] The Examiner proposed a capitalization variable in amount depending on whether the claims of the holders of the Debtor's First Terminal and Unifying Bonds were held to be payable in guilders. These claims were ultimately held by the Supreme Court not to be payable in guilders. *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247 (1939).

Exceptions to this Proposed Report were argued orally before the Commission on May 16, 1938.

On January 10, 1939, in response to a further petition filed by Walter E. Meyer in April, 1938 (R. 480) and a memorandum filed by him in November, 1938 (R. 480-500), the Commission reopened the proceedings for the purpose of receiving further evidence relating to charges made by Meyer with respect to the effect upon the Debtor's earnings and assets of control by Southern Pacific (R. 500-501). Thereafter, hearings were held *for this sole purpose* from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 529). At these hearings a vast amount of evidence, including hundreds of exhibits, was introduced (R. 529-2680, 2681-3055).

On June 30, 1941, the Commission issued its initial Report and Order setting forth its Plan for the Debtor (R. 3495-3735; 249 I. C. C. 5). In said Report, of which 131 pages are devoted to an elaborate consideration of the Meyer charges (R. 3547-3678), the Commission, so far as the present petitions are concerned, found and determined—upon "a consideration of the entire record, including the elements of value referred to, the earnings and prospective earnings" (R. 3700)—

> (1) that the "fixed-interest charges immediately following reorganization should be about $1,500,000 a year" (R. 3691); that "the new capitalization should not exceed approximately $75,000,000, of which not more than one-half should be in the form of debt, nor more than one-fourth in the form of preferred stock, and the remainder in common stock" (R. 3692); that "debt claims totaling $8,304,118 can receive no recognition within the limits of capitalization approved" (R. 3700); that "the equities of the holders of the stock of the debtor have no value"

(R. 3700); and that therefore the stockholders could recieve no recognition in the reorganization; and

(2) that the charges of Walter E. Meyer against Southern Pacific were entirely without foundation (R. 3547-3678).

Thereafter petitions for modification of the Plan were filed. On March 9, 1942, the Commission issued its Supplemental Report and Order, which modified its original plan in certain relatively minor respects but which reaffirmed the same so far as the present petitions are concerned (R. 3736-3820; 252 I. C. C. 325). On March 23, 1942, the modified plan was certified to the District Court (R. 3494-3495).

From October 26, 1942, to November 5, 1942, hearings were held before the late Judge Davis upon objections to the Plan, at which additional evidence, including data as to recent earnings, was presented (R. 4051-5136). The great bulk of such additional evidence related to the charges made by Walter E. Meyer against Southern Pacific (R. 4157-4199, 4202-4209, 4304-5136). The parties stipulated that the entire record before the Commission and "every record that has been made in this case from its inception" should be deemed in evidence before the District Court (R. 4057).

Prior to the filing of briefs in support of the Plan and objections thereto, Judge Davis died. The case was then referred to Judge Moore (R. 5138), who, after a conference with counsel, including Mr. Meyer, on April 23, 1943, entered an order directing a reargument on May 31, 1943, upon the case as submitted before Judge Davis, with all parties having the right to apply for leave to present additional testimony (R. 5181-5183).

In the meantime, on March 15, 1943, the Supreme Court handed down its opinions in the *Western Pacific* (318 U. S. 448) and *Milwaukee* (318 U. S. 523) cases. Thereafter the

principal contentions now made by Petitioners were argued orally and on written briefs before Judge Moore. At this hearing *neither Mr. Meyer nor any other party sought leave to present additional evidence.* On February 8, 1944, the District Court filed an opinion and entered an order in which it approved the Plan (R. 5183-5212; *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914).

Upon appeals from said order by Petitioners and others (which were argued in April, 1945), all the principal contentions now made by Petitioners were, in essence, argued orally and on written briefs. On August 26, 1946, the Circuit Court of Appeals (which apparently held up its opinion until the coming down of the decision of this Court in the *Denver* case) affirmed the order of the District Court except in a minor respect not here relevant (R. 5559-5683; *St. Louis Southwestern Ry. Co.* v. *Henwood,* 157 F. (2d) 337). Thereafter petitions for rehearing were denied (R. 5831).

ARGUMENT.

PART I.

The contention that the Plan has become unfair because of changed conditions.

1. To the extent to which it has not already been foreclosed by the decisions of the courts below, Petitioners' contention is one which should be, and can be, presented in the first instance to the District Court; and there will still be opportunity for final review by this Court.

Petitioners' complaints stem from the Commission's finding (R. 3692, 3700), affirmed by both courts below (R. 5211-5212, 5653-5671), that the value of the Debtor's properties for purposes of the plan is $75,000,000. Because this

sum did not provide sufficient capitalization to take care of all creditor claims, the Commission found that the equity of the stockholders was without value (R. 3700), and both courts below have affirmed this finding (R. 5211-5212, 5653-5671).

Petitioners do not assert that the decision of the Commission was erroneous when made, *i.e.*, on the basis of the evidence then before the Commission.[2] They do not even assert that the decision of the District Court, affirming the finding of the Commission, was erroneous when made. Their basic contention here is that since the decisions of the Commission and the District Court—

> (1) the assets of the Debtor have increased so substantially, as the result of large earnings, that the Debtor is now "solvent," and
>
> (2) the earning power of the Debtor has increased so substantially as to bring about a fundamental change in the basic factor on which the Commission predicated its finding of value,

so that the Plan may no longer be regarded as "fair and equitable".

Respondents question whether there exists any "changed conditions" which clearly were not in contemplation of the Commission. But whether or not there has been such a change is not an issue which this Court should be asked to decide on the basis of conflicting and unverified assertions made in briefs—at least at this stage in the

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[2] The Debtor expressly disclaims any challenge of the Commission's findings (No. 936, p. 25).

The Petitioner Meyer, of course, challenges the Commission's findings to the extent that it did not accept the charges made by him against Southern Pacific and others.

proceedings. This is an issue of fact which (to the extent to which it has not been foreclosed by the decisions of the two courts below)[3] should be presented to the District Court, which can receive evidence *pro* and *con; and there will be at least two opportunities for Petitioners to raise this issue in the District Court before the Plan can be confirmed.*

In the case at bar, unlike the *Denver* case decided by this Court in June, 1946, and again in February, 1947, the Plan has not yet been submitted to the creditors for a vote. Under Section 77(e), the next step in the instant case (if the petitions for certiorari be denied and if the District Court does not direct different action) is for the Commission to submit the Plan to the creditors for a vote thereon. When such vote has been taken, the Plan must come again before the District Court to be confirmed; and at that time (as made clear by this Court in the *Denver* case) Petitioners can raise the contentions which they are here making. At that time (if any class of creditors have rejected the Plan) Petitioners will be in a position to support such contentions by evidence; and parties wishing to oppose the same will be able to offer contrary evidence.

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[3] In *Insurance Group Committee, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, No. 690, October Term, 1946, decided February 3, 1947, this Court said:

> "* * * we ruled in our decision of June 10, 1946, * * * that in this reorganization no changed circumstances, up to that date, presented to us by the debtor or other respondents in that review justified a re-examination of the plan as confirmed. This ruling was binding upon the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to our decision. When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. * * *"

Even before the Plan is submitted for a vote, the District Court will be in a position (after the disposition of the pending petitions for certiorari) to remand the Plan to the Commission *not for submission to the creditors, but for a re-examination of the question of the fairness of the Plan in the light of changed conditions.* As a matter of fact, a petition to this end is now pending in the District Court and will undoubtedly be brought on for hearing as soon as the District Court has recovered jurisdiction over the Plan.[4]

When the Commission approved the Plan, it necessarily undertook to forecast the Debtor's *future* earnings. As stated in *Insurance Group Committee, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, No. 690, October Term, 1946, decided February 3, 1947, earnings estimates by the Commission "are made with allowance for changing economic conditions." If the Commission's forecast was made on sound principles (and Petitioners do not here assert the contrary), it must be accepted as valid, under the *Western Pacific* and *Milwaukee* decisions, unless and until it can be demonstrated that there has been a change of conditions which clearly was not envisaged by the Commission. As late as October, 1946, when the petitions for rehearing were denied, the Circuit Court of Appeals held that there had been no such change. Conceivably, notwithstanding the finding, it may be shown that, in the light of changes since October, 1946, there have been material changes not contemplated by the Commission; but, at this stage of the proceedings, the place for such a showing is the District Court.

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[4] Late in December, 1946, one Carl Rosenberger, owner of certain bonds and stocks of the Debtor, filed a motion in the District Court asking that the Plan be remanded to the Commission because of "changed conditions." The hearing on said motion has been set for March 28, 1947.

When, many months hence, the Plan comes before the District Court for confirmation, Petitioners will be able to raise the point of "changed conditions". If their contentions are rejected they may appeal to the Circuit Court of Appeals; and if unsuccessful there, they will still have recourse to the Court upon certiorari.

If, in the case at bar, this Court should now undertake to decide whether there have been "unanticipated, large earnings" during the period between the Commission's formulation of the Plan and the time of this Court's decision, and should decide that there had been none, grave injustice might be done, and no real progress would have been made toward the consummation of a Plan. This Court's decision would have covered *only a part* of the period with respect to which an objector to the Plan could introduce evidence (as to changed conditions) when the Plan comes before the District Court for confirmation; the position of the objectors to the Plan would be weakened to a substantial but indeterminate extent; and those who supported the Plan would still have no assurance that the Plan would eventually be confirmed.

2. The applicable principles have been fully stated by this Court in recent decisions.

In every Section 77 proceeding in which the plan was formulated by the Commission prior to, or during the early stages of, the recent war, contentions have been advanced which are, in all substantial respects, identical with those here asserted, *i.e.*, that the plan has become inapplicable because of "changed conditions" resulting from "unanticipated, large earnings." Three such cases have been reviewed by this Court, one quite recently. In each such case this Court, while recognizing the power of a District Court to remand the plan to the Commission because of changed

conditions (and also the power of an appellate court under certain circumstances to remand the plan to the Commission for the same reason), has held that the objectors had failed to sustain the burden of showing that there had been a change of conditions which could not fairly be said to have been in the contemplation of the Commission when the plan was formulated.

In *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943), the Court said (pp. 507, 508, 509):

> "* * * Respondents ask us to take into consideration the changed conditions since the Commission acted. * * *
>
> "In the interest of advancing the solution of as many problems in reorganization as possible, we have deliberated upon the effect to be given these unexpectedly large earnings. There are factors in these increased incomes which obviously affect their weight as evidence of continued capacity to produce earnings available for dividends. * * *
>
> * * * * * *
>
> "* * * The Commission's forecast was made with knowledge and not in disregard of past fluctuations of income, in war and in peace. On the showing as to changed conditions made before the District Court, there was no basis for a disapproval of the Commission plan as unfair to the junior equities. The further evidence of increased earnings, placed in the record by the stipulations, does not lead us to reject the Commission's plan."

Dealing with the same issue, this Court, in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523 (1943), said (pp. 542, 543, 544):

> "The question of the increase in earnings since the Commission approved the plan raises of course different issues. As we have indicated in the *Western*

Pacific case, the power of the District Court to receive additional evidence may aid it in determining whether changed circumstances require that the plan be referred back to the Commission for reconsideration. * * *

"We agree with the Circuit Court of Appeals that no sufficient showing of changed circumstances has been made which requires the District Court to return the plan to the Commission for reconsideration. * * * In view of these considerations, we cannot say that the junior interests have carried the burden which they properly have of showing that subsequent events make necessary a rejection of the Commission's plan."

Still later, in *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, decided June 10, 1946, this Court said (66 S. Ct. 1282, 1291, 1296):

"* * * Changes in economic conditions cannot affect the powers of the reorganization agencies even though such changes may require a reexamination into the present fairness of the former exercise of those powers.

* * * * * *

"* * * Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanation of the plan."

The matter was even more recently before this Court in *Insurance Group Committee, et al.* v. *The Denver and*

Rio Grande Western Railroad Company, et al., No. 690, October Term, 1946, decided February 3, 1947. In that case the Court assumed, arguendo, "that both this Court upon appeal from an order of confirmation in bankruptcy, and the bankruptcy court itself, after its order of confirmation has been affirmed on review (11 U.S.C. § 205(f)), may take cognizance of subsequent changes in conditions and order a plan re-examined by the Interstate Commerce Commission"; and then, after outlining facts alleged to show "changed conditions" of substantially the same general character as those alleged in the case at bar, held "that the debtor has failed to allege the existence of changed conditions since our decision of June 10, 1946, of a kind not 'envisaged and considered by the Commission in its deliberations upon or explanations of the plan.'" The Court further stated:

> "Much of what we have written is directed at the suggestion that there should be a plenary re-examination of reorganization proposals for the Denver & Rio Grande. As to that suggestion, we are of the opinion that the record affirmatively shows a proper basis for the valuation and allocation of securities by the Commission, * * * and that the record fails to show any sound basis for a re-examination on account of changed circumstances between May, 1941, and June 10, 1946.
>
> "So far as the period since June 10, 1946, is concerned, there is no basis in this record or in anything judicially known to us for a conclusion that there has been a significant change in interest rates, earnings available for interest or traffic. Nor do we see that the action of Congress in passing S. 1253, on July 31, 1946, should persuade us to require a stay to await further enactments that might affect this reorganiza-

> tion. It was vetoed. * * * We must continue to act under the now existing law.* * *"

The Circuit Court of Appeals in the case at bar had all except the last of these decisions before it when it reached its decision. In fact, there is reason to believe that the Court held up its decision for several months awaiting the June 10, 1946, decision in the *Denver* case. The only issue thus presented is whether, on the particular facts of this case, the court below correctly applied the applicable principles so recently and fully stated by this Court. We respectfully submit that this does not raise an issue which should be reviewed by this Court.

3. Petitioners have misconceived the basis upon which the relief they seek should be predicated.

Petitioners have consumed much space in endeavoring to show that, because of decrease in indebtedness and increase in current assets, the Debtor is now "solvent". The present proceedings, however, were not instituted because Debtor was "insolvent", but because it was "unable to meet its debts as they matured" (R. 26). This latter allegation alone was all that was necessary to give the District Court jurisdiction (11 U. S. C. A., §205 (a)). Plainly, therefore, in determining whether the stockholders have been improperly excluded from the Plan, the test is not whether the Debtor is "insolvent", but whether the stockholders' equity possesses a real value; and the answer to this question, in an appellate court, must always be in the negative unless the stockholders can demonstrate affirmatively that the Plan not only fully satisfies the admittedly prior claims of the creditors, but *actually overpays the creditors.*

Thus, in *Insurance Group Committee, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, No. 690, October Term, 1946, decided February 3, 1947, this Court said:

> "The Commission made no finding that the cash value of the securities allocated to the senior creditors paid them in full. To justify the change of position of creditors from fully secured to partially secured, creditors were given opportunities to participate in profits through common stock ownership with a chance at larger earnings than the Commission's forecast anticipated. * * * The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor. We think the absence of such an allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.
>
> "Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, *the debtor's insistence on a re-examination of the plan is without substantial support.* * * *" (Italics supplied.)

In the case at bar Petitioners have not even alleged, let alone undertaken to show, that the creditors whose claims are treated in the Plan have been, in effect, overpaid. In this connection, it may be pointed out that in spite of Debtor's admittedly high earnings, its First Terminal and Unifying Bonds (having a total claim for principal and interest of over 102) are now selling on the New York Stock

Exchange at about 80, and its General and Refunding Bonds (having a total claim of approximately 122) are selling at about 88.

4. The validity of Petitioners' basic assumption has not been established.

Underlying Petitioners' contentions is the assumption that since the Commission formulated the Plan, Debtor's assets have increased to a point where it is now "solvent." Without undertaking to discuss the question whether Debtor is or is not now "solvent", we point out that Petitioners' assumption is predicated upon a misapprehension of the bases on which the Commission arrived at a total valuation of $75,000,000.

Thus, Southern Pacific argues: When the Commission fixed a valuation of $75,000,000, there was a "deficit" of $8,304,118, *i.e.*, the debt claims exceeded $75,000,000 by only $8,304,118;[5] comparing Debtor's August 31, 1941, balance sheet (which, Southern Pacific asserts, "may be regarded as forming the basis for the Commission's values in its Supplemental Report") with its balance sheet for October 31, 1946, there has been an increase in current assets and a decrease in debt aggregating $27,119,075, so that Debtor is now "solvent" by a margin of $18,800,000, or, if the debt is computed on the basis of the pledged bonds held by certain noteholders rather than on the basis of the notes held by such noteholders (as, of course, it must be, since under the Plan the noteholders are treated as if they were the outright owners of the pledged bonds held by them),

[5] If the debt claims were computed on the basis of the pledged Bonds held by three noteholders (who, under the Plan, are treated as the outright owners of the pledged Bonds), the "deficiency" would have been over $20,000,000.

Debtor is now "solvent" by a margin of $6,800,000 (No. 879, pp. 8, 28, 29).

A basic flaw in this argument is the assumption that the Commission's valuation of $75,000,000 *did not take into account future prospects of large earnings which, as the District Court put it* (R. 5208), *was "apparent from the circumstances prevailing."* This assumption is plainly ill-founded.

In its initial Report, the Commission stated that it fixed the new capitalization of $75,000,000 on the basis of "all the data of record on property valuation and past and *prospective* earnings" (R. 3692). In its Supplemental Report it pointed out that it had considered "all the data of record" including "traffic and earnings to the latest available date" and "also *future prospects* of traffic and earnings"; and that it arrived at the sum of $75,000,000 upon "a consideration of the earning power of the property, past, present and *prospective,* and all other relevant facts" (R. 3741, 3774-3775).

It is thus clear that the Commission undertook to fix an over-all value for the Debtor's properties, and that in fixing such over-all valuation the Commission gave greatest weight to earning power, including "traffic and earnings to the latest available date" and "also *future prospects* of traffic and earnings."[6]

Since, therefore, in arriving at the $75,000,000 valuation the Commission took into account the prospective large earnings resulting from the war (*i.e.*, the very earnings which Petitioners now offer as a basis for suggesting that the Commission might change its mind if it were required to

[6] The District Court, following the *Western Pacific* and *Milwaukee* cases, properly held that the Commission was not required to spell out in detail the precise method by which it arrived at the $75,000,000 valuation (R. 5206).

consider the matter again), Petitioners may not properly compare Debtor's current balance sheet with the balance sheet for August 31, 1941, or for any earlier date, and assume that any intervening increment in assets represents an increase in the valuation of the properties *over and above that fixed by the Commission.* To state it differently, the changes in net current assets or other assets since the date of the Commission's Supplemental Report may not represent an *increase* in the over-all value as found by the Commission, but merely a *realization* of the total value which the Commission reached on the basis of "future prospects of traffic and earnings" (R. 3741).

Impliedly recognizing this weakness in their argument, Petitioners seek to escape it by suggesting that, whereas in the *Denver* case the plan was not formulated by the Commission until June 1943, in the case at bar the Commission's "last look" at the situation was in March, 1942, over a year earlier. This discrepancy in time would seem to be of little consequence. In the case at bar the European war had been under way for *nearly two years* at the time of the initial Report of June 30, 1941, and its effect was being sharply reflected in all railroad earnings. The Commission itself pointed out in said Report (R. 3691) that Debtor's earnings for the first four months of 1941 indicated that its income available for fixed charges for that entire year would be "substantially in excess of the Trustee's forecast of $4,142,000." At the time of the Supplemental Report of March 9, 1942, the United States had been at war for several months; and the Commission was fully aware that in 1941 Debtor had earnings available for fixed charges of $7,495,940.40, a figure which was substantially in excess of earnings for any year in Debtor's prior history (R. 2683, 5205) and not greatly less than Debtor's earnings for 1942,

1943, and 1944. Debtor's income available for fixed charges in 1941 was in excess of the comparable figure for 1945 (R. 5727), and, on the basis of income available for fixed charges of $6,803,389 for the first 11 months of 1946 (Trustee's Monthly Report dated January 13, 1947, filed in the District Court), was almost exactly identical with its probable earnings for 1946. Necessarily, therefore, this Court must assume that the Commission's valuation would have been *substantially less than $75,000,000* had it not been for the weight which the Commission said it gave to "prospective" earnings.

Obviously, therefore, the "solvency" of Debtor cannot be tested by adding to said sum of $75,000,000 the amount of the increase in Debtor's assets since the Commission's formulation of the Plan.

5. There is no conflict of decisions.

The Petitioner Southern Pacific Company asserts (No. 879, pp. 41-43) that the decision of the court below is in conflict with the recent decision of the District Court for the Northern District of Illinois in the *Rock Island* case, now pending on appeal, in which Judge Igoe refused to *confirm* the plan because of radical changes in the debtor's earnings and assets subsequent to the Commission's formulation of the plan (see, Appendix E, No. 879). In the *Rock Island* case, however, the plan had been voted on and was up before the District Court for *confirmation;* and the basic question before the District Court, as in the *Denver* case (66 S. Ct. 1282), was whether the refusal of certain classes of creditors to approve the Plan was "reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." As pointed out above (pp. 9-11, *supra*), that stage has not been reached in the case at bar.

Moreover, apart from the fact, there is no conflict. Both decisions recognize the power of a court, under proper circumstances, to remand the Plan because of "changed conditions".

The Debtor asserts (No. 936, pp. 43-48) a conflict with the decision of the Second Circuit in the so-called *Equitable Building* case,—*Adelaide H. Knight et al.* v. *Wertheim & Co., et al.*, decided December 31, 1946 (see, Appendix D, No. 936). In that case, a proceeding under Chapter X of the Bankruptcy Act, the Circuit Court of Appeals held that the District Court had abused its discretion in refusing, prior to final consummation of the plan, to submit to the shareholders an offer to purchase the new company's shares at a price which, together with the bankrupt's liquid assets, *would have permitted paying off the creditors in full, both principal and interest.* In holding that the District Court had abused its discretion, the Court said, in effect, that "If the legally protected interests of any opposing parties are fully preserved," there is no "good reason to deny others any reasonable chance to protect their own interests * * *." The situation in the *Equitable* case is wholly unlike that in the case at bar, since here Petitioners do not even suggest that if the Plan is remanded to the Commission, the creditors will be paid off in full, both principal and interest.

PART II.

The special contentions of petitioner Walter E. Meyer (No. 909).

1. The Circuit Court of Appeals fully performed the required judicial review and correctly held that there was substantial evidence to sustain the Commission's finding, affirmed by the District Court, that the Debtor's earning power has not been impaired by breaches of fiduciary and other obligations by Southern Pacific and others.

Mr. Meyer's chief contention is that the Commission's findings as to valuation and capitalization were predicated upon an erroneous conception of Debtor's real earning power because it did not take into account various alleged breaches of fiduciary and other obligations by Southern Pacific which are said to have impaired Debtor's earnings and assets (No. 909, pp. 2, 19, 26). Thus, he alleges that after Southern Pacific acquired control of Debtor in April, 1932, it failed to obtain for Debtor large amounts of traffic which it should have obtained (No. 909, pp. 7-8); that it failed to carry out the Turney-Saunders agreement to solicit traffic preferentially for Debtor (No. 909, p. 8); and that it caused Debtor to solicit traffic contrary to its best interests (No. 909, pp. 8-9). He further contends that prior to Southern Pacific's acquiring control in 1932, Debtor had been under the illegal control of various competitive railroads, including Southern Pacific, as the result of which its assets had been wasted and earnings impaired (No. 909, pp. 3-6). He also contends that Southern Pacific's claim as a creditor and stockholder should be expunged, or at least subordinated, not only because of the matters above alleged, but because Southern Pacific prevented Debtor from enforcing causes of action under the anti-trust laws

against Kansas City Southern and others (No. 909, pp. 2, 26, 34-36). Finally he asserts that the Plan was formulated on inadequate data, that he was not afforded an adequate opportunity to present evidence of his charges, and that the Commission failed to make an independent investigation of his charges (No. 909, pp. 37-42).

A large amount of evidence purporting to sustain these charges was introduced by Mr. Meyer at the initial Commission hearings in March and April, 1937 (R. 168-212). Thereafter said charges were the subject of further hearings before the Commission, held solely for the purpose, from May 5 to May 27, and from September 18 to September 30, 1939, at which a vast amount of evidence, including hundreds of exhibits, was introduced (R. 529-3055). This evidence was exhaustively considered by the Commission in its initial Report, wherein (after discussing in detail *every allegation by Mr. Meyer*) it concluded that none of the charges was well-founded (R. 3547-3678).

After the Commission issued its initial Report of June 30, 1941, Mr. Meyer filed numerous objections thereto. The Commission carefully considered these objections in its Supplemental Report of March 9, 1942, and concluded that none of them was well-founded; and it reaffirmed its original determinations with respect to the Meyer charges (R. 3742-3752).

Thereafter, at the hearing before the District Court upon objections to the Plan, Mr. Meyer reiterated his charges against Southern Pacific, and introduced a large amount of additional evidence with respect thereto (R. 4157-4199, 4202-4209, 4304-5166).

Mr. Meyer asserts (No. 909, pp. 3, 19, 31-32) that the District Court did not review the Commission's findings and that the Circuit Court of Appeals did not make an

"adequate review." The record shows clearly, however, that the District Court carefully considered Mr. Meyer's charges specifically and in detail (R. 5197-5203) in its opinion of February 9, 1944, and concluded (R. 5202) that Mr. Meyer "has not convinced either this Court or the Commission that his charges are well-founded."[7] It further found (R. 5202):

> "* * * that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of his various allegations and objections, and that the time elapsed during the pendency of these proceedings has afforded ample time for him to fully prepare his case."

With respect to Mr. Meyer's contention that Southern Pacific's creditor claim should be expunged or subordinated, the District Court pointed out the additional facts that certain parties, but not Meyer, filed objections in the District Court to Southern Pacific's claim; that extended hearings on such objections were held before a Special Master who found in favor of Southern Pacific; that exceptions were taken to the Master's report which were overruled and the claim allowed; and that in view of Meyer's failure to avail himself of the chance to object to Southern Pacific's claim he may not be heard to make any objection (R. 5199).

Upon appeal the Circuit Court of Appeals dealt exhaustively and painstakingly with each of Mr. Meyer's charges, devoting 88 out of 117 pages of its opinion to these matters (R. 5564-5652).

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[7] As to the charge of derelictions by Southern Pacific prior to April, 1932, see R. 3637; as to alleged derelictions after April, 1932, including the alleged failure to carry out the Turney-Saunders agreement, see R. 3669-3670; as to the charge that Southern Pacific prevented the Debtor from asserting causes of action for violation of the anti-trust laws, see R. 3678; as to the charge that Mr. Meyer's contentions were not adequately investigated, see R. 3549-3676.

A review of the voluminous record shows, we submit, that rarely before have so many charges received such prolonged and careful attention by so many administrators and judges.

As stated by the District Court (R. 5203), the issues raised by Mr. Meyer "are matters requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements and other data peculiarly within the comprehension of the I. C. C." In view of the finality which attaches to the Commission's findings of fact, and particularly findings as to valuation, capitalization and all other matters affecting the public interest, we submit that the affirmation of the Commission's emphatic rejection of Mr. Meyer's charges by both courts below is conclusive upon this Court. See, *U. S.* v. *Commercial Credit Co., Inc.*, 286 U. S. 63, 67 (1932); *Texas & N. O. Railroad Co.* v. *Ry. Clerks*, 281 U. S. 548, 558 (1930).

2. The Circuit Court of Appeals correctly held that the procedure followed by District Judge Moore upon the death of District Judge Davis did not constitute an abuse of discretion.

Mr. Meyer's contention that he was entitled to a "new trial" upon the death of Judge Davis is wholly ill-founded.

After the Commission certified the Plan to the District Court, hearings were held on objections thereto before the late Judge Davis (R. 4051 *et seq.*). At these hearings additional evidence was introduced, the bulk of which was presented by Mr. Meyer (R. 4157-4199, 4304-5136). During the hearings all parties presented their respective arguments except Debtor and Mr. Meyer, whose arguments were set down for hearing on December 18, 1943 (R. 4991). Before these arguments were had and briefs filed, Judge Davis

died. Thereafter the parties appeared before Judge Moore, to whom the case was assigned, to discuss the procedure to be followed. After an extended discussion (R. 5138-5180), Judge Moore entered an order, dated April 23, 1943, that the record on the Plan as certified by the Commission and the record theretofore made before the late Judge Davis be taken as submitted, that the Plan and the objections thereto and claims for equitable treatment be set down for oral argument on May 31, 1943, and that during or at the conclusion of said oral argument the Court *would entertain any motion respecting the taking of additional testimony or otherwise pertaining to the completion of the record on the Plan* (R. 5182). The District Court reserved the right to amend or modify the order in any manner consistent with Section 77 (R. 5183). On May 31, 1943, the parties appeared by counsel before Judge Moore and submitted their respective oral arguments. *Neither Mr. Meyer nor any other party made any request for leave to present additional evidence.*

Mr. Meyer contends (No. 909, pp. 47-50) that upon the death of Judge Davis he was entitled to a complete hearing *de novo*. The Circuit Court of Appeals held that the granting of a hearing *de novo* was a matter within the discretion of the District Court and that that court did not abuse its discretion in following the procedure above outlined (R. 5567-5569).

Whatever may be the applicable rule with respect to ordinary jury or non-jury trials, these respondents submit that none of the parties was entitled, as of right, to a hearing entirely *de novo* after the death of Judge Davis. Under the special statutory reorganization scheme of Section 77, by which the functions of the Commission and the District

Court are "brigaded,"[8] the great bulk of the evidence, of necessity, is presented in the first instance to the Commission; and this evidence necessarily comes before the District Court in the form of a written transcript. If the District Judge does not approve the plan, he is directed to remand the same to the Commission and to "transmit to the Commission *a copy of any evidence received*" (11 U. S. C. A., §205(3)). To contend that it is proper for a District Court to review and pass upon evidence received by the Commission (or for the Commission to consider evidence introduced before the District Court) but that it is improper for a District Judge to review and pass upon purely supplementary evidence introduced before a predecessor judge who died before he could review his decision is absurd,—especially in view of Petitioners' assumption that *this Court* may and should consider all kinds of unverified documentary and other data bearing on Debtor's earnings and assets since the record was closed in the District Court! As a matter of fact, although most District Courts in Section 77 proceedings have made it a practice to receive additional evidence on the hearing upon objections to the plan, there is nothing in the statute which requires that such additional evidence be received and it would appear to be entirely a matter of discretion whether the District Court shall receive such additional evidence.[9]

Moreover, whatever may have been Mr. Meyer's technical right to a rehearing *de novo*, such right was clearly waived by him. Although Mr. Meyer and his associate, Mr.

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[8] *Palmer* v. *Massachusetts*, 308 U. S. 79, 87 (1940).

[9] The courts have recognized that rules of procedure applicable to ordinary jury or non-jury trials upon the death or retirement of the judge do not apply in special statutory proceedings which may be drawn out over many years. See, *In re Nolan's Will*, 63 Atl. 618 (N. J., 1906); *Barton* v. *Burbank*, 138 La. 997, 71 So. 134 (1916); *Matter of Carey*, 24 App. Div. 531 (4th Dept., 1897).

Chubb, made statements at the conference before Judge Moore in April, 1943, which indicated that they believed that they were entitled to a hearing *de novo,* Mr. Meyer clearly indicated that he had no real objection to Judge Moore considering the evidence which had been presented before Judge Davis and that what he really wanted was an opportunity to present *additional evidence;* and the chief question discussed was whether Mr. Meyer had a legal right to present additional evidence.

Thus, Mr. Meyer stated (R. 5155):

> "• • • all I want is an opportunity to introduce this new testimony, an opportunity, if I may use the word, to educate Your Honor as to the facts of this extraordinary case. And I am not here for any other purpose."

Finally, at the very end of the hearing, Mr. Chubb stated specifically (R. 5180):

> "• • • Mr. Meyer has said and I have said that *it is our present intention to take no exception to the use of such testimony as has already been taken.* • • •"

Moreover, neither in his elaborate brief of 242 pages before the District Court dated July 2, 1943, nor in his reply brief of 109 pages dated August 4, 1943, did Mr. Meyer make any contention that the District Court was precluded from considering the evidence which had been introduced before Judge Davis or that by reason of Judge Davis' death he was entitled to a hearing *de novo.* As a matter of fact, many of the contentions in Mr. Meyer's briefs were in whole or in part predicated upon the testimony presented before Judge Davis.

Having thus led the parties and the District Court to believe that he had no objection to Judge Moore considering

the evidence which had been introduced before Judge Davis, obviously Mr. Meyer cannot now be heard to complain that Judge Moore did consider that evidence; and having thereafter failed, at the hearing before Judge Moore on May 31, 1943, to request permission to present additional evidence, pursuant to Judge Moore's order of April 23, 1943 (R. 5182), he cannot now be heard to complain on that score.

3. The Circuit Court of Appeals correctly denied Mr. Meyer's motion to remand.

While the appeals were pending in the court below, the Petitioner Meyer moved to remand the proceedings to the Commission on the ground of newly-discovered evidence, alleged to have been revealed in the complaint in an anti-trust action brought by the United States against the Association of American Railroads and others in August, 1944, in the District Court for the District of Nebraska, and in the so-called "Western Agreement" annexed to said complaint. The court below denied the motion on the ground that Mr. Meyer had been familiar with the Western Agreement for many years and hence that it did not constitute newly-discovered evidence (R. 5571-5573).

Mr. Meyer's attempt to bring this issue before this Court must fail, first, because the denial of a motion for a new trial on the ground of newly-discovered evidence is not reviewable except for manifest abuse of discretion.

> *Royal Ins. Co.* v. *Eastham*, 71 F. (2d) 385 (C. C. A. 5th, 1934), c. d. 293 U. S. 557 (1935);
> *McIntyre* v. *Texas Co.*, 48 F. (2d) 211, 212 (C. C. A. 2d, 1931).

Moreover, the action of the Circuit Court of Appeals was plainly correct. A new trial will not be granted on the ground of newly-discovered evidence unless the moving

party clearly establishes (1) that he did not discover, and by the exercise of reasonable diligence could not discover, the evidence until after the original hearing, and (2) that the evidence is not merely cumulative, but possesses such weight as to indicate that a rehearing would probably produce a different result. *Crow* v. *Dumke*, 142 F. (2d) 635 (C. C. A. 10th, 1944). Mr. Meyer's petition utterly fails to show how the alleged newly-discovered evidence might have affected the Commission's findings. Moreover, the record shows that at least as early as December 22, 1932, Mr. Meyer was familiar with the so-called Western Agreement (Exhibit 225, before the Commission). As a matter of fact, the Western Agreement was more or less public knowledge long before the Debtor's bankruptcy (see testimony of Joseph B. Eastman, Hearings before the Senate Committee on Interstate Commerce on S. 942, 78th Cong., 1st Sess., pp. 831-832, 834).

Conclusion.

The petitions raise no questions of general importance. There is no conflict of decisions and the decision is clearly correct. The petitions should be denied.

Respectfully submitted,

February 22, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 879

SOUTHERN PACIFIC COMPANY, a railroad corporation, Intervener, *Petitioner,*

vs.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, et al., *Respondents.*

No. 909

WALTER E. MEYER, Intervener, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, et al., *Respondents.*

No. 936

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation, Debtor, *Petitioner,*

vs.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The respondent Chemical Bank & Trust Company (hereinafter referred to as the "General and Refunding Trus-

tee"), the successor and sole Trustee under the Debtor's General and Refunding Mortgage dated July 1, 1930, files this brief in opposition to the petitions of the Debtor, Southern Pacific Company and Mr. Walter E. Meyer which request this Court to review the decision of the Circuit Court of Appeals affirming the District Court's order approving the Plan of Reorganization of the Debtor (hereinafter referred to as the "Commission's Plan").

Reports and Opinions Below

The Report and Order of the Interstate Commerce Commission (herein referred to as the "Commission") of June 30, 1941 (R. 3495-3735) are reported in 249 I. C. C. 5, and its Supplemental Report and Order of March 9, 1942 (R. 3736-3820) are reported in 252 I. C. C. 325.

The opinion of the District Court (R. 5183-5212) is reported in 53 F. Supp. 914. The opinion of the Circuit Court of Appeals (R. 5559-5683) is reported in 157 F. (2d) 337.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered August 26, 1946 (R. 5681-5683). Petitions for rehearing were denied October 22, 1946 (R. 5831). The petitions for writs of certiorari were filed, respectively, January 13, 1947 (No. 879), January 18, 1947 (No. 909), and January 21, 1947 (936). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)), and Section 24 of the Bankruptcy Act (11 U. S. C. Sec. 47 (c)).

Statute Involved

The statute involved is Section 77 of the Bankruptcy Act as amended (11 U. S. C. Sec. 205).

STATEMENT

The Scope of This Brief

The General and Refunding Trustee is the sole representative in the reorganization proceedings of the Debtor, of the members of the public who own outright $9,327,500 in principal amount of General and Refunding Bonds.

The General and Refunding Trustee believes that the allocation of securities of the reorganized company to the General and Refunding Bondholders by the Commission's Plan constitutes the minimum treatment to which the General and Refunding Bondholders are entitled. Under the Commission's Plan the brunt of the Debtor's reorganization falls to a great extent on the General and Refunding Bondholders. Any recognition of stockholders of the Debtor by the distribution to them of securities of the reorganized company would most seriously affect the General and Refunding Bondholders and might indeed be made at their expense. It is on this account that the General and Refunding Trustee submits this brief.

The General and Refunding Trustee has studied the briefs in opposition filed herein on behalf of Guaranty Trust Company, Trustee under the Debtor's First Terminal and Unifying Mortgage and by the Protective Committee for holders of the Debtor's First Terminal and Unifying Bonds. In order to avoid repetitious argument, this brief will merely present certain facts relating to the status of the General and Refunding Bondholders in the Debtor's reorganization and a brief argument which points out that full compensatory treatment of the General and Refunding Bondholders will require more than the mere issuance of additional shares of common stock of the reorganized company, sufficient to fill the gap between the amount of the claim on each General and Refunding Bond and the aggregate principal amount and par value of new securities allocated to each such claim by the Commission's Plan.

Status of the General and Refunding Bondholders in the Debtor's Reorganization

Outstanding General and Refunding Bonds

There are outstanding under the General and Refunding Mortgage $39,557,500 principal amount of General and Refunding Bonds, of which

$ 9,327,500	in principal amount are held outright by the public;
23,903,000	in principal amount are pledged to secure the Debtor's notes in the principal amount of $17,882,250 acquired by Southern Pacific Company from Reconstruction Finance Corporation;
4,921,500	in principal amount are pledged to secure notes of the Debtor in the principal amount of $3,500,000 to The Chase National Bank of the City of New York; and
1,405,500	in principal amount are pledged to secure notes of the Debtor in the principal amount of $1,000,000 to the Mississippi Valley Trust Company.
$39,557,500	total principal amount outstanding.

(R. 3780-3781)

Representation of the General and Refunding Bondholders in the Debtor's Reorganization Proceedings

The Chase National Bank of the City of New York and Mississippi Valley Trust Company (herein referred to as "the Banks") are jointly represented in these proceedings by their own counsel, and have actively participated throughout these proceedings in their own interest.

Southern Pacific Company, the holder of most of the Debtor's stock and the pledgee of General and Refunding Bonds, is represented by its own counsel and has filed one of the petitions now being considered.

There have been a number of instances in these proceedings where the interests of the outright owners of General and Refunding Bonds and of the pledgees of such Bonds have not been identical. In each such instance the General and Refunding Trustee has considered the matter solely from the viewpoint of the interests of such outright owners and has urged the Commission and the Courts to adopt the solution which it believed would be most beneficial to them.

Counsel for the Banks and counsel for Southern Pacific Company have made no objection to this practice of the General and Refunding Trustee.

At this stage of the proceedings there is no conflict of interest between the outright owners of General and Refunding Bonds and the pledgees as such. It is true that the Commission's Plan treats the pledgees as if they were outright owners of the pledged General and Refunding Bonds which in principal amount greatly exceed the principal amount of the Debtor's notes for the payment of which General and Refunding Bonds were pledged. It is conceivable that a conflict of interest would arise between the outright owners and pledgees of General and Refunding Bonds if the value of the securities so allocated to the pledgees of the General and Refunding Bonds were to exceed the amounts owed by the Debtor on the notes.

A serious conflict of interest does exist between the outright owners of the General and Refunding Bonds and Southern Pacific Company, as the owner of approximately 87% of the outstanding stock of the Debtor.

Allocation to the General and Refunding Bondholders Proposed in the Commission's Plan

The Commission's Plan proposes that, subject to adjustment for interest payments made on the Debtor's securities after December 31, 1941 (R. 3812), the reorganized company shall issue to the holders of General and Refunding Bonds, both publicly held and pledged, for the claim as of January 1, 1942, of $1,320.59 for principal and interest on each $1,000 in principal amount of such Bonds, the following securities:

$182.23	in principal amount of new Consolidated Mortgage Bonds;
301.78	in par value of new Preferred Stock; and
433.07	in par value of new Common Stock.
$917.08	(R. 3781).

The Commission concluded that the capitalizable assets of the Debtor would not permit the issuance of any securities with respect to $403.51 of the claim of $1,320.59 for principal and interest on each $1,000 General and Refunding Bond (R. 3781). This deficiency has now been reduced to a deficiency of $307.92 on each such Bond by interest payments made since the effective date of the Commission's Plan.

ARGUMENT

The petitioners have failed to meet the burden of showing that full compensatory treatment could be awarded to the General and Refunding Bondholders in a revised Plan.

No representative of the Debtor's stockholders claims that any securities of the reorganized company should be distributed to stockholders of the Debtor in the event that its capitalization remains fixed at $75,000,000. Accordingly, unless Mr. Meyer's contention is adopted and the claim of Southern Pacific Company, as a creditor, is disallowed, any distribution of shares of stock of the reorganized company to the stockholders of the Debtor must be made out of additional shares of common stock to be provided for by increasing the capitalization of the reorganized company above that fixed in the Commission's Plan. Any such increase in the capitalization of the reorganized company would have to be made out of its equity now allocated to the General and Refunding Bondholders and to unsecured creditors.

In distributing securities in its Plan, the Commission first took care of the most senior rights of each class of creditors. Bonds secured by all mortgages of the Debtor senior to the General and Refunding Mortgage (including the First Terminal Bonds pledged under the General and Refunding Mortgage) were given recognition. On the same basis, the General and Refunding Bondholders were awarded Consolidated Mortgage Bonds and preferred stock of the reorganized company in recognition of the first liens of the General and Refunding Mortgage (R. 3778). The entire amount of new Consolidated Mortgage Bonds and all of the shares of new preferred stock were required to satisfy liens senior to the fourth blanket lien of the General and Refunding Mortgage. All that was left for distribution at this point in the allocation was common

stock. All of the common stock was allocated to the General and Refunding Bondholders, both public holders and pledgees, except certain shares which were awarded to the Central Arkansas and Stephenville Bondholders in recognition of their claim as unsecured creditors to a portion of the free assets of the Debtor.

The common stock of the reorganized company therefore represents the residue of the Debtor's assets left after all claims senior to those of the General and Refunding Bondholders are satisfied. If the holders of the Debtor's outstanding stock are to share at all in the securities of the reorganized company, their share will have to come out of this residue.

The foregoing supplemental statement of facts demonstrates that the outright owners of General and Refunding Bonds are required by the Commission's Plan to make many sacrifices. Among other things, they will lose their position as creditors of the Debtor and will become stockholders of the reorganized company except as to the relatively small amount of bonds of the reorganized company to be issued to them.

In spite of the drastic treatment accorded the General and Refunding Bondholders by the Commission's Plan, the General and Refunding Trustee has not attacked it because the Trustee considers that the Commission has recognized all of the liens and other rights of the General and Refunding Bondholders.

The General and Refunding Trustee, however, has attacked the suggestion made in the Court below by the Debtor and Southern Pacific Company that the changed financial condition of the Debtor and the alleged increase in its prospective earning power could be recognized in a revised Plan by filling out the claims of the General and Refunding Bondholders with additional shares of common stock of the reorganized company at the rate of $1.00 in par value of such common stock for each $1.00 of unsatisfied claim and by then issuing the remaining additional shares of new common stock to stockholders of the Debtor.

Full compensatory treatment of the General and Refunding Bondholders might indeed be qualitative instead of quantitative, but the necessity for such treatment is an additional element to be considered in determining whether the improvement in the financial condition of the Debtor and the alleged increase in its earning power require the upsetting of the Commission's Plan which has been declared fair by the Commission and by the Courts below.

CONCLUSION

For the foregoing reason and for the reasons set forth in the carefully considered Reports of the Commission and in the opinions of the Courts below, the General and Refunding Trustee believes that the petitions for writs of certiorari should be denied.

Dated: February 21, 1947.

Respectfully submitted,

ALFRED H. PHILLIPS,
Of Counsel for Chemical Bank & Trust Company, as Successor Trustee under the General and Refunding Mortgage of St. Louis Southwestern Railway Company.